UNIVERSITY *of* PENNSYLVANIA
LAW REVIEW

Founded 1852

Formerly
AMERICAN LAW REGISTER

VOL. 168 MARCH 2020 NO. 4

ARTICLE

MEASURING *IN ABSENTIA* REMOVAL IN IMMIGRATION COURT

INGRID EAGLY† & STEVEN SHAFER††

No academic study has empirically analyzed decisions by United States immigration judges to deport noncitizens without first providing them a day in court, a procedure known as in absentia *removal. Yet bold assertions by members of the current*

† Professor of Law, UCLA School of Law. For helpful feedback and comments, the authors thank Jeffrey Chase, Catherine Kim, Kennji Kizuka, Katy Lewis, Sue Long, Peter Margulies, Michelle Mendez, Jaya Ramji-Nogales, Ben Nyblade, Aaron Reichlin-Melnick, Emily Ryo, Philip Schrag, Amy Semet, and participants in the UCLA Criminal Justice Faculty Workshop. In addition, we recognize Jodi Kruger, Sasha Novis, and Brittany Roberts for their excellent research assistance, and the editors at the *University of Pennsylvania Law Review* for their superb editorial support.

†† Managing Attorney, Esperanza Immigrant Rights Project and Research Associate, UCLA School of Law Empirical Research Group.

presidential administration that immigrants "never" appear in court drive central policy decisions on immigration enforcement, including growing the immigration detention system, limiting access to asylum, and building a border wall. By reviewing immigration court data from 2008 to 2018 made publicly available by the Executive Office of Immigration Review, this Article provides the first-ever independent analysis of in absentia *removal orders. Contrary to claims that all immigrants abscond, our data-driven analysis reveals that 88% of all immigrants in immigration court with completed or pending removal cases over the past eleven years attended all of their court hearings. If we limit our analysis to only nondetained cases, we still find a high compliance rate: 83% of all respondents in completed or pending removal cases attended all of their hearings since 2008. Moreover, we reveal that 15% of those who were ordered deported* in absentia *since 2008 successfully reopened their cases and had their* in absentia *orders rescinded. Digging deeper, we identify three factors associated with* in absentia *removal: having a lawyer, applying for relief from removal (such as asylum), and court jurisdiction. These and other important findings have immediate implications for key immigration policy questions.*

INTRODUCTION

Do immigrants come to their immigration court hearings? This question is central to current debates about the immigration court system. President Donald Trump and members of his Administration have made bold and inconsistent claims about purportedly dismal court appearance rates. In 2018

and 2019, government officials contended that noncitizens never appear in court;[1] that only 2% or 3% of immigrants appear in court;[2] and that 20% appear in court.[3] Policymakers rely on these and other assertions about purported failures to appear to drive key decisions, including to expand reliance on immigration detention[4] and to reduce access to asylum.[5] Appearance rates are also pivotal to the current debate about building a border wall, which the Administration has sought to justify in part by claiming that those who cross the southern border simply "vanish" into the country and never come to court.[6]

---

1 *See, e.g.*, Remarks During a Roundtable Discussion on Tax Reform in Cleveland, Ohio, 2018 DAILY COMP. PRES. DOC. 2 (May 5, 2018) ("Our immigration laws are a disgrace . . . . We give them, like, trials. That's the good news. The bad news is, they never show up for the trial. . . . Nobody ever shows up."); Remarks Prior to a Working Lunch with President Kersti Kaljulaid of Estonia, President Raimonds Vejonis of Latvia, and President Dalia Grybauskaite of Lithuania and an Exchange with Reporters, 2018 DAILY COMP. PRES. DOC. 3 (Apr. 3, 2018) ("We cannot have people flowing into our country illegally, disappearing, and, by the way, never showing up to court.").

2 Remarks at the American Farm Bureau Federation's 100th Annual Convention in New Orleans, Louisiana, 2019 DAILY COMP. PRES. DOC. 6 (Jan. 14, 2019) ("Tell me, what percentage of people come back [for their trial]? Would you say 100 percent? No, you're a little off. Like, how about 2 percent? [*Laughter*] . . . Two percent come back. Those 2 percent are not going to make America great again, that I can tell you. [*Laughter*]"); Remarks at the National Federation of Independent Businesses 75th Anniversary Celebration, 2018 DAILY COMP. PRES. DOC. 5 (June 19, 2018) ("Do you know, if a person comes in and puts one foot on our ground . . . they let the person go; they say show back up to court in 1 year from now. One year. . . . But here's the thing: That in itself is ridiculous. Like 3 percent come back.").

3 White House Legislative Director Marc Short told CNN's Wolf Blitzer that "[e]ighty percent of those that are coming here illegally never show up for court and are never deported." Kyle Feldscher & Marc Rod, *White House Says Family Separations at the Border Are a 'Binary Choice,' but Stats Say Otherwise*, CNN (June 18, 2018, 9:54 PM EDT), https://www.cnn.com/2018/06/18/politics/family-separations-marc-short-cnntv/index.html [https://perma.cc/X3QY-BLSW] (internal quotation marks omitted). CNN reported that it was "unclear where Short got his statistic that 80% of the people who come to the US illegally do not show up for court." *Id.*

4 For example, amid claims that migrants will not come to court, President Trump has called for $4.2 billion in additional funding to dramatically increase the federal government's capacity to detain immigrants. *See President Donald J. Trump Calls on Congress to Secure Our Borders and Protect the American People*, WHITE HOUSE (Jan. 8, 2019), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-calls-congress-secure-borders-protect-american-people [https://perma.cc/2NJH-WW5V].

5 On November 9, 2018, President Trump issued a presidential proclamation drastically reducing access to asylum, supported in part by a claim that under the present system, "many released aliens fail to appear for hearings." Proclamation No. 9822, 83 Fed. Reg. 57,661, 57,661 (Nov. 9, 2018).

6 *See, e.g.*, *Remarks by President Trump in Cabinet Meeting*, WHITE HOUSE (Jan. 2, 2019, 12:04 PM EST), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-cabinet-meeting-12 [https://perma.cc/DGU8-VBE6] (arguing that "[t]he United States needs a physical barrier, needs a wall, to stop illegal immigration" and claiming that without a wall asylum seekers will enter the country and instead of coming to court will "vanish[] and escape[] the law"). For an excellent review of the range of enforcement policies implemented by President Trump, see SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP (2019).

Under the immigration law in effect since 1990, an immigration judge must order a noncitizen who misses even one court hearing deported.[7] This type of deportation without the individual being present in court is called *in absentia* removal,[8] based on the Latin phrase meaning "in the absence of."[9] Prior to 1990, immigration judges had discretion over how to handle missed court appearances, including by holding an *in absentia* hearing, dismissing the case, continuing the case, or administratively closing the case.[10] The 1990 change in the law formally eliminated this judicial authority to make independent determinations as to how to proceed when respondents fail to appear in court.[11] Instead, immigration judges must order removal *in absentia* if the respondent is not in court at the scheduled hearing, provided the government can first establish by "clear, unequivocal, and convincing evidence" that the noncitizen is subject to removal and that written notice of the hearing was provided to the respondent.[12] Those subject to *in absentia*

7 *See* Immigration Act of 1990, Pub. L. No. 101-649, § 545(a), 104 Stat. 4978, 5063 (codified as amended at 8 U.S.C. § 1229a(b)(5)(a) (2018)) ("Any alien who . . . does not attend a proceeding under section 242, shall be ordered deported under section 242(b)(1) in absentia."). As Eisha Jain has shown, deportation is just the tip of a larger enforcement system that bears many similarities to the criminal justice system. *See generally* Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463 (2019).

8 The term removal has been used since 1997 to refer to the decision of the immigration judge to order an individual removed from the United States. Prior to April 1997, removal proceedings were separated into distinct procedures for exclusion and deportation. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 308(d)(4)(B), 110 Stat. 3009-546, 3009-585 (amending a section of the immigration law by "striking 'exclusion or deportation' and inserting 'removal'").

9 EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2013 STATISTICS YEARBOOK, Glossary of Terms at 7 (2014), https://www.justice.gov/sites/default/files/eoir/legacy/2014/04/16/fy13syb.pdf [https://perma.cc/U3WF-W7S3] [hereinafter EOIR 2013 YEARBOOK].

10 Immigration and Nationality Act (I.N.A.) § 242(B)(c)(3), 8 U.S.C. § 1252(b) (1988); *see also* Memorandum from William R. Robie, Chief Immigration Judge, Exec. Office for Immigration Review, to All Immigration Judges, Operating Policy and Procedure Memorandum 84-2: Cases in Which Respondents/Applicants Fail to Appear for Hearing 1 (Mar. 7, 1984), http://libguides.law.ucla.edu/ld.php?content_id=38258649 [https://perma.cc/W2WH-WDP9] (describing operating policy and procedures for how immigration judges may proceed if a respondent fails to appear). *See generally* Iris Gomez, *The Consequences of Nonappearance: Interpreting New Section 242B of the Immigration and Nationality Act*, 30 SAN DIEGO L. REV. 75, 78-80 (1993) (discussing the impact of the 1990 reform in the *in absentia* law on judicial discretion).

11 Immigration Act § 545(a), 104 Stat. at 5063. As Jason Cade has shown, government trial attorneys have very little discretion and must "present the government's position" by requesting "in absentia removal orders against respondents who fail to show up." Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 TUL. L. REV. 1, 67 (2014).

12 Immigration and Nationality Act (I.N.A.) § 240(b)(5)(A), 8 U.S.C. § 1229a(b)(5)(A) (2018); *see also* 8 C.F.R. § 1003.26 (2019) (defining *in absentia* hearings and identifying factors sufficient to order a respondent deported *in absentia*). EOIR defines an *in absentia* order as "[a]n order issued when an immigration judge determines that a removable alien received the required notice about their removal hearing and failed to appear." EOIR 2013 YEARBOOK, *supra* note 9, Glossary of Terms at 7.

removal are generally barred from seeking admission to the United States or relief from removal for a period of years.[13]

Since the 1990 law was put in place, U.S. government officials have routinely relied on a purported rise in the prevalence of *in absentia* removal orders to support major policy shifts to the immigration system and to buttress legal arguments defending those changes. For example, in 1995 Congress relied on government-produced statistics showing a "high rate of no-shows for those criminal aliens released on bond" to change the immigration law to require that noncitizens with certain convictions be mandatorily detained pending deportation without access to a bond hearing.[14] In 2002, the Solicitor General cited those same government *in absentia* statistics as persuasive authority in defending against a challenge to the constitutionality of mandatory detention.[15] The U.S. Supreme Court later relied on the government's statistical claims to uphold as reasonable the constitutionality of mandatory detention for immigrants with criminal convictions to prevent "an unacceptable rate of flight."[16] More recently, officials from the Trump Administration's Department of Justice (DOJ) have repeatedly told the public that many asylum seekers "simply disappear and never show up at their immigration hearings,"[17] thus justifying tighter restrictions on the asylum law and even criminal prosecution of asylum seekers to prevent the court system from being "gamed."[18] Claims about

13 *See generally* I.N.A. § 212(a)(6)(B), 8 U.S.C. § 1182(a)(6)(B) (2018) (providing that failure to appear without reasonable cause renders a noncitizen inadmissible for five years); I.N.A. § 240(b)(7), 8 U.S.C. § 1229a(b)(7) (stating that failure to appear for a removal hearing bars a noncitizen from relief for ten years).

14 S. REP. NO. 104-48, at 32 (1995); *see also id.* ("Congress should consider requiring that all aggravated felons be detained pending deportation. Such a step may be necessary because of the high rate of no-shows for those criminal aliens released on bond."). The resulting mandatory detention rules for those with convictions are codified at I.N.A. § 236(c), 8 U.S.C. § 1226(c).

15 Brief for Petitioners at 19, Demore v. Kim, 538 U.S. 510 (2003) (No. 01-1491), 2002 WL 31016560 (arguing that "more than 20% of criminal aliens who were released on bond or otherwise not kept in custody throughout their deportation proceedings failed to appear for those proceedings").

16 Demore v. Kim, 538 U.S. 510, 519-20 (2003); *see also id.* at 519 ("Once released, more than 20% of deportable criminal aliens failed to appear for their removal hearings.").

17 *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, U.S. DEP'T OF JUSTICE (Oct. 12, 2017), https://www.justice.gov/opa/speech/attorney-general-jeff-sessions-delivers-remarks-executive-office-immigration-review [https://perma.cc/L6TA-BFFK]; *see also Attorney General Sessions Delivers Remarks on Immigration Enforcement*, U.S. DEP'T OF JUSTICE (Apr. 11, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-immigration-enforcement [https://perma.cc/ZBN7-55FZ] (claiming that "loopholes in our laws [are] being exploited by illegal aliens" who, after release from detention, "simply disappear[]—never show[] up for their hearings in immigration court").

18 *Attorney General Jeff Sessions Delivers Remarks to the Executive Office for Immigration Review*, *supra* note 17. For a thorough analysis of the rise in criminal prosecutions under the Trump Administration, see Ingrid V. Eagly, *The Movement to Decriminalize Border Crossing*, 61 B.C. L. REV. (forthcoming 2020) (on file with authors).

failures to appear have also been relied upon by the Department of Homeland Security (DHS) in rolling out the new Migrant Protection Protocols (MPP) program that requires migrants to remain in Mexico to await their immigration court hearings.[19] The Department of Health and Human Services and DHS have also prominently relied on purportedly high *in absentia* rates to argue in favor of radically restructuring the established system that protects children against long-term detention.[20]

Summary adjudication of cases—without the opportunity to respond and without regard to the merits of the individual's eligibility for relief—has been controversial and raises serious due process concerns.[21] The practice also differs markedly from the criminal system, where failure to appear at trial is generally treated with issuance of an arrest warrant,[22] not adjudication of the merits of the underlying case without the defendant present in court. For

19 In announcing the MPP on December 20, 2018, DHS Secretary Kirstjen Nielsen claimed that without the new program asylum seekers would simply "disappear into the United States, where many skip their court dates." Press Release, U.S. Dep't of Homeland Sec., Secretary Kirstjen M. Nielsen Announces Historic Action to Confront Illegal Immigration (Dec. 20, 2018), https://www.dhs.gov/news/2018/12/20/secretary-nielsen-announces-historic-action-confront-illegal-immigration [https://perma.cc/ZSS3-3SWB] (internal quotation marks omitted); *see also Migrant Protection Protocols*, U.S. DEP'T OF HOMELAND SEC. (Jan. 24, 2019), https://www.dhs.gov/news/2019/01/24/migrant-protection-protocols [https://perma.cc/KZH4-D3SR] (justifying the Administration's new MPP program based in part on the claim that migrants released into the country "disappear before an immigration judge can determine the merits of any claim").

20 *See, e.g.*, Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,486, 45,494 (proposed Sept. 7, 2018) (codified at 8 C.F.R. pts. 212, 236; 45 C.F.R. pt. 410) ("While statistics specific to family units have not been compiled, the reality is that a significant number of aliens who are not in detention either fail to appear at the required proceedings or never actually seek asylum relief, thus remaining illegally in the United States."); *see also Acting Secretary of Homeland Security Kevin K. McAleenan on the DHS-HHS Federal Rule on Flores Agreement*, U.S. DEP'T OF HOMELAND SEC. (Aug. 21, 2019), https://www.dhs.gov/news/2019/08/21/acting-secretary-mcaleenan-dhs-hhs-federal-rule-flores-agreement [https://perma.cc/82YS-V9E4] (quoting the Acting Secretary of Homeland Security Kevin K. McAleenan claiming that the majority of removal orders issued to families have been issued *in absentia*, thus benefitting those with "meritless claims" for asylum).

21 *See, e.g.*, Lei, 22 I. & N. Dec. 113, 121 (B.I.A. 1998) (Rosenberg, Board Member, concurring in part and dissenting in part) ("It is difficult to imagine what could be more prejudicial to a respondent charged with being deportable from the United States than denial of an opportunity to be present at his deportation hearing where he might provide any defenses to the charges against him, or advance any claims he may have for relief from deportation."); Villalba-Sinaloa, 21 I. & N. Dec. 842, 847-48 n.2 (B.I.A. 1997) (Rosenberg, Board Member, dissenting) (urging the majority to consider constitutional concerns when interpreting the statutory provision for *in absentia* removal). *See generally* Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 224 (2016) (arguing that *in absentia* removal proceedings "may permit efficient processing of cases, but they do little to ensure that notice is actually received by migrants who may wish to appear for their hearings but lack adequate information").

22 Failure to appear is often treated in state court systems as a misdemeanor crime to be adjudicated separately from the merits of the underlying case. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2506(A)(1), (B) (2019); CAL. PENAL CODE § 1320(a) (2019).

example, pursuant to Federal Rule of Criminal Procedure 43, a defendant's presence in court is required at the beginning of trial and cannot be waived.[23] This is very different from the immigration court system, where there is no protection requiring in-person appearance before commencing the trial.[24]

Although much is at stake, little is actually known about how often immigrants come to court and the factors associated with these *in absentia* orders. President Trump and other officials offer no verifiable empirical support for their claims that migrants "never" or rarely come to court. Therefore, scholars, members of the press, and other experts have turned to the annual report published by the statistical division of DOJ's Executive Office for Immigration Review (EOIR).[25] The EOIR's annual statistical report has typically included a measurement of the *in absentia* removal rate, but has offered only a sparse description of the method used to reach their measurement.[26] No independent analysis of EOIR's method for calculating *in absentia* removal has been performed.

This Article is the first academic study of *in absentia* removal orders in United States immigration courts.[27] In it, we analyze eleven years of

---

23 FED. R. CRIM. P. 43(a); *see also* Crosby v. United States, 506 U.S. 255, 262 (1993) ("The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial."). If, however, the defendant fails to appear after already appearing at the beginning of the trial, the trial may continue under certain circumstances. FED. R. CRIM. P. 43(c).

24 *See* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. 181, 218 (2017) (explaining that unlike in criminal court, a respondent's failure to appear in immigration court constitutes an "automatic loss for the noncitizen").

25 *See generally Statistics Yearbook*, U.S. DEP'T OF JUSTICE: EXEC. OFFICE FOR IMMIGRATION REVIEW, https://www.justice.gov/eoir/statistical-year-book [https://perma.cc/X6GZ-BGQ4] (last updated Aug. 30, 2019) (containing links to Statistics Yearbooks from fiscal year 2000 through fiscal year 2018). Earlier "statistical summaries" were also prepared by the EOIR. *See* Steve Y. Koh, *Nonacquiescence in Immigration Decisions of the U.S. Courts of Appeals*, 9 YALE L. & POL'Y REV. 430, 431 n.4 (1991) (citing to a 1990 EOIR "Statistical Summary" that was on file at EOIR). We requested these statistical summaries from EOIR with a FOIA request, but were informed that EOIR's office that maintains statistics was unable to find any legacy files because "the office that maintains statistics was not formed prior to this time and does not retain custody of reports not produced by them." Letter from Joseph R. Schaaf, Senior Counsel for Admin. Law, Exec. Office for Immigration Review, U.S. Dep't of Justice, to Ingrid Eagly (Mar. 21, 2019) (on file with authors).

26 We note that the EOIR's 2018 Yearbook included measurements of total *in absentia* removals, but for the first time eliminated a calculation of the *in absentia* removal rate. *Compare* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, STATISTICS YEARBOOK: FISCAL YEAR 2018, at 33 (2019), https://www.justice.gov/eoir/file/1198896/download [https://perma.cc/YG5G-2CNC] [hereinafter EOIR 2018 YEARBOOK] (providing data on the number of *in absentia* orders issued in fiscal years 2014–2018), *with* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, STATISTICS YEARBOOK: FISCAL YEAR 2017, at 33 (2018), https://www.justice.gov/eoir/page/file/1107056/download [https://perma.cc/DC4B-YUDQ] [hereinafter EOIR 2017 YEARBOOK] (reporting *in absentia* rates in addition to the numbers of *in absentia* orders).

27 In conducting this study, we acknowledge the foundational work of other researchers. The pathbreaking research of Transactional Records Access Clearinghouse (TRAC), an independent

immigration court data (from fiscal years 2008–2018)[28] recently made available to the public as part of the EOIR's new "transparency initiative."[29] Our analysis provides the most sophisticated statistical investigation of *in absentia* removal available, including both a critique of the limitations of EOIR's statistical approach and a proposal for new methods to measure how often immigrants attend their court hearings. Our verifiable measurements debunk the claims of the current administration that immigrants "never" appear for their court hearings, enhance public understanding of the EOIR's statistical reporting, and offer data-driven insights into the factors associated with court appearance.

---

data-gathering nonprofit at Syracuse University, has made updated EOIR statistics available to the public and published on its website detailed reports of first impression on the prevalence of *in absentia* removal orders in specific populations, such as cases involving parents with minor children. *See, e.g.*, *Details on Deportation Proceedings in Immigration Court*, TRAC IMMIGRATION, https://trac.syr.edu/phptools/immigration/nta [https://perma.cc/D2KV-UVQ5] (select "Hearing Attendance," "Immigration Court State," and "Month and Year Case Began," and click link for "Not Present at Last Hearing (Absentia Decision)") (last visited Jan. 10, 2020) (organizing *in absentia* totals by state and time period). Helpful data analysis tools on TRAC's web page also permit users to count the number of *in absentia* removal orders in certain immigration courts (for example, immigration courts in California) and in certain types of cases (for example, cases involving juveniles). *See, e.g.*, *Priority Immigration Court Cases: Women with Children*, TRAC IMMIGRATION, https://trac.syr.edu/phptools/immigration/mwc [https://perma.cc/6THA-MWUX] (last visited Feb. 1, 2020); *Juveniles—Immigration Court Deportation Proceedings*, TRAC IMMIGRATION, https://trac.syr.edu/phptools/immigration/juvenile [https://perma.cc/A25A-TBZD] (last visited Feb. 1, 2020) (laying out annual immigration court cases of juveniles from 2004 through 2019). Our project also benefits from research by the Catholic Legal Immigration Network and the Asylum Seeker Advocacy Project that provided independent analysis of the reasons why families seeking asylum have missed court hearings. *See* ASYLUM SEEKER ADVOCACY PROJECT & CATHOLIC LEGAL IMMIGRATION NETWORK, INC., DENIED A DAY IN COURT: THE GOVERNMENT'S USE OF *IN ABSENTIA* REMOVAL ORDERS AGAINST FAMILIES SEEKING ASYLUM 16-20 (2019), https://asylumadvocacy.org/wp-content/uploads/2018/04/Denied-a-Day-in-Court-2019-Update.pdf [https://perma.cc/96EB-CTR8] [hereinafter DENIED A DAY IN COURT] (discussing how families may miss court hearings in part due to lack of notice). Finally, we acknowledge the influential early work of the Vera Institute of Justice to study pre-trial release programs associated with increased appearance rates in immigration court. *See* EILEEN SULLIVAN ET AL., VERA INST. OF JUSTICE, 1 TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM ii, 33, 36 (2000), https://www.vera.org/publications/testing-community-supervision-for-the-ins-an-evaluation-of-the-appearance-assistance-program [https://perma.cc/2QGW-T6C2] (finding that roughly 90% of noncitizens who were supervised appeared in court, compared with 71% of nonparticipants).

28 EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir [https://perma.cc/L2AV-VLYR] (last visited Jan. 10, 2020) (providing a link to download EOIR case data under the heading "EOIR Case Data").

29 *See* Press Release, U.S. Dep't of Justice, Executive Office for Immigration Review Releases Court Statistics, Announces Transparency Initiative (May 9, 2018), https://www.justice.gov/opa/pr/executive-office-immigration-review-releases-court-statistics-announces-transparency [https://perma.cc/75LJ-79QK] (explaining that the reoccurring public release of immigration court data is intended to increase transparency and therefore introduce accountability to the immigration court system).

This Article proceeds in three Parts. Part I begins by summarizing the EOIR's statistical presentation of data on *in absentia* removals. Relying exclusively on the numbers published in EOIR's Statistics Yearbooks, Part I analyzes the choices that EOIR has made in its statistical reporting of *in absentia* removals, which it reports both in absolute numbers and as a percentage of initial immigration judge decisions.[30]

Part II moves beyond the narrow presentation in the EOIR Yearbooks and engages in an original analysis of the national court data released by EOIR. Specifically, Part II supplements EOIR's approach by developing two additional methods for measuring the *in absentia* rate: (1) as a percentage of all initial case completions (including initial immigration decisions and administrative closures); and (2) as a percentage of all matters (including initial immigration decisions, administrative closures, and pending cases). Administrative closure, a procedure by which a case is indefinitely removed from the immigration court's active docket, reached a rate as high as one-fourth of initial case completions during our study period.[31] Pending cases also ballooned, reaching over 700,000 cases by the end of our study, with many left pending for years.[32] Critically, for both cases that ended in administrative closure and cases that remained pending, we show that immigrants appeared in court when required to do so for scheduled hearings.[33] If the significance of the *in absentia* rate is to measure the likelihood that immigrants comply with their scheduled court dates, failure to acknowledge administrative closures and pending cases in presenting data on *in absentia* decisions leaves gaps in our understanding of what is happening in immigration courts.

We find that over the eleven years of our study, *in absentia* removals were 18% of initial immigration judge decisions (EOIR's standard measurement), but only 16% of all initial case completions, and 12% of all matters.[34] We argue

30 As we discuss in Part I, "initial immigration judge decision" is a term of art that the EOIR uses to refer to the first merits decision by the immigration judge.

31 This statistic is based on the authors' calculations using EOIR data. *See infra* Figure 1 and accompanying text; Table 6 and accompanying text. Under the Obama Administration, administrative closure increased as prosecutors exercised discretion to request closure of cases with strong equities that were not a priority for removal. *See* Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1157-59 (2015) (describing the practice of administrative closure as outlined in a 2011 memo that emphasized the administration's focus on high priority cases).

32 *See infra* Figure 1 and accompanying text; Table 6 and accompanying text.

33 For purposes of our analysis, we measure whether the respondent appears at the relevant hearing based on whether the judge orders *in absentia* removal at that hearing. Under the law in effect during the time period of our study, judges must order a removable respondent who fails to appear removed *in absentia* unless a valid notice of the hearing was not provided. *See supra* text accompanying note 12.

34 These measurements include all custody statuses. *See infra* Table 6 ("Total" calculations for fiscal years 2008–2018). In Part II of our Article, we focus on nondetained cases only and find that

that these two additional calculation methods (all completions and all matters) are important and capture large number of cases that are overlooked in the government's statistical reporting of immigration court data.

Our independent analysis presented in Part II also uncovers other evidence that enhances knowledge about the *in absentia* process. Notably, we find that 15% of the *in absentia* orders issued during the eleven-year period of our study were successfully rescinded.[35] Our analysis of EOIR data suggests that this percentage will increase in the future as the *in absentia* orders issued in the final years of our study begin to be challenged in court. Yet measurements of the reopening of *in absentia* orders are not included in any government reporting on *in absentia* removal.

Part III proceeds further by exploring the relationship between *in absentia* removal decisions and three important factors: attorney representation, filing of claims for relief, and court location. We find a strong relationship between each of these three factors and the *in absentia* removal rate. Individuals who filed claims for relief (such as asylum or cancellation of removal) are very unlikely to miss court: 95% attended all of their court hearings over the eleven years of our study in pending and completed nondetained cases.[36] Those who obtained lawyers also almost always came to court: 96% attended all court hearings in pending and completed nondetained cases since 2008.[37] In addition, the prevalence of *in absentia* removal varied widely based on court location, ranging from a low of 15% of initial case completions in New York City, to a high of 54% in Harlingen, Texas.[38] These and other findings have meaningful policy implications, which we explore in the Conclusion.

I. EOIR'S MEASUREMENTS

Each year, EOIR publishes a Statistics Yearbook that contains a limited amount of information about *in absentia* removal.[39] To date, this information

in absentia removals were 34% of initial immigration judges' decisions, 27% of all completions, and 17% of all matters. *See infra* Table 7 ("Total" calculations for fiscal years 2008–2018).

35 *See* I.N.A. § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) (2018) (providing that following a motion to reopen a case, an *in absentia* removal order may be rescinded if the respondent's failure to appear was due to exceptional circumstances or the respondent did not receive adequate notice).

36 *See infra* note 209 and accompanying text.

37 *See infra* Figure 3.

38 This variation in jurisdictional *in absentia* rate is measured among the twenty-five most active base city jurisdictions. *See infra* Figure 5 and accompanying text.

39 Statistics Yearbooks dating back to fiscal year 2000 are publicly available on the EOIR web page. *See Statistics Yearbook*, *supra* note 25 (linking to Statistics Yearbooks from fiscal years 2000–2018). Prior to fiscal year 2013, the Yearbook was called the "Statistical Year Book," but the name has now been changed to the "Statistics Yearbook." *Compare* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2012 STATISTICAL YEAR BOOK (2013), https://www.justice.gov/

has been the only available government publication on *in absentia* orders in immigration courts. These published statistics are widely cited by the press,[40] academics,[41] nonprofits and think tanks,[42] and lawmakers.[43]

EOIR has consistently presented three different data points on *in absentia* removals. First, it publishes the total number of *in absentia* removal orders issued each year.[44] Second, it measures the overall "rate" of *in absentia* removal among both detained and nondetained respondents. Third, because *in absentia* orders are rare in detention,[45] it provides measurements for the *in absentia* rate in nondetained cases, a population that includes both individuals who were never detained and those who were detained at some point but released from detention.[46] In this Part, we reproduce these numbers from EOIR's Statistics Yearbook in order to familiarize readers with what these numbers measure. Later, in Part II, we build on EOIR's analysis and introduce alternative methods for measuring *in absentia* removal.

A. *Counting* In Absentia *Removal Orders*

The EOIR Statistics Yearbook reports the total number of *in absentia* removal orders issued by immigration judges each fiscal year. EOIR categorizes immigration court cases based on the type of immigration question under review by the judge, including removal, credible fear review,

---

sites/default/files/eoir/legacy/2013/03/04/fy12syb.pdf [https://perma.cc/BL8D-XMWQ] [hereinafter EOIR 2012 YEARBOOK], *with* EOIR 2018 YEARBOOK, *supra* note 26.

40 *See, e.g.*, Nolan Rappaport, *Trump's Fast-Tracked Deportations May Be Only Solution to Backlog*, THE HILL (Oct. 19, 2017, 11:50 AM), https://thehill.com/opinion/immigration/356211-trumps-fast-tracked-deportations-may-be-only-practical-solution-to [https://perma.cc/24T8-W6AM] (citing data from the 2016 Statistics Yearbook).

41 *See, e.g.*, Gilman, *supra* note 21, at 159-60 & nn.5-6 (citing data from the 2015 Statistics Yearbook).

42 *See, e.g.*, JEANNE BATALOVA, ANDRIY SHYMONYAK & MICHELLE MITTELSTADT, MIGRATION POLICY INST., IMMIGRATION DATA MATTERS 16 (2019), https://www.migrationpolicy.org/research/immigration-data-matters [https://perma.cc/6TUL-RYE5] (pointing readers to EOIR Statistics Yearbooks for further information concerning immigration proceedings).

43 *See, e.g.*, *Review of the President's Emergency Supplemental Request for Unaccompanied Children and Related Matters: Hearing Before the S. Comm. on Appropriations*, 113th Cong. 119 (2017) (answer of Juan P. Osuna, Director, Executive Office for Immigration Review, Department of Justice) (citing the 2013 Statistics Yearbook).

44 Technically, EOIR only includes in the Yearbooks the number of *in absentia* removal orders issued at the initial case completion stage. *See infra* notes 51–53 and accompanying text.

45 As we explain, *infra* notes 66–68 and accompanying text, immigration judges have ordered *in absentia* removal for respondents held in United States custody, despite the fact that doing so raises due process issues given that respondents in detention are dependent on the government to transport them to the scheduled hearing.

46 EOIR also included measurements for *in absentia* removals in asylum cases and UAC cases in its 2017 Yearbook. EOIR 2017 YEARBOOK, *supra* note 26, at 33-34. We analyze asylum cases in Part III of this Article.

and reasonable fear review.[47] According to EOIR, 223,498 out of 237,000 cases received by the immigration courts in 2016 were for removal, making removal by far the dominant type of case.[48] Removal cases require the judge to make a decision whether to deport someone from the United States, or instead to grant the individual relief to remain in the United States.[49] EOIR's accounting of *in absentia* orders is not limited to removal cases, but instead includes *in absentia* orders issued in all case types.[50]

Beginning in fiscal year 2013, EOIR adopted an "initial case completion" method for its statistical reporting, and backdated this approach to fiscal year 2009.[51] This method continued in EOIR's statistical reporting through fiscal year 2016.[52] EOIR defines an "initial case" as "[t]he proceeding that begins when the Department of Homeland Security files a charging document with an immigration court and ends when an immigration judge renders a determination."[53] Although many immigration cases do end with the initial

47 EOIR reports eleven different case types. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2016 STATISTICS YEARBOOK B2 & tbl.4 (2017), https://www.justice.gov/eoir/page/file/fysb16/download [https://perma.cc/VT6Z-P5UM] [hereinafter EOIR 2016 YEARBOOK] (listing different "case types").

48 *Id.* at B1 & tbl.3.

49 *See infra* notes 200–206 and accompanying text (describing the two-stage process of removal proceedings).

50 *See* EOIR 2016 YEARBOOK, *supra* note 47, at A1 (defining immigration court matters to include all case types); *id.* at P1 (reporting the number of *in absentia* orders out of all initial case completions for all case types).

51 EOIR 2013 YEARBOOK, *supra* note 9 (page preceding Table of Contents) ("[I]n an effort to clarify the agency's workload, EOIR has changed the methodology for counting matters received and matters completed, which will affect the appearance of those numbers in the Statistics Yearbook."). Prior to fiscal year 2013, EOIR counted both initial and subsequent proceedings and therefore created less clarity about the status of the court's workload. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 16 n.74 (2015) (discussing EOIR's shift from a proceeding-level analysis to an initial case completion approach).

52 Beginning with the 2017 Yearbook, EOIR made two changes to reported statistics on initial case completions and *in absentia* orders. First, EOIR began to focus solely on "I-862" case types, meaning just removal, deportation, and exclusion case types. *Compare* EOIR 2017 YEARBOOK, *supra* note 26, at 7 (defining the I-862 case types used for initial case completions and *in absentia* orders), *with* EOIR 2016 YEARBOOK, *supra* note 47, at A1 (defining immigration court matters to include all case types). Second, EOIR redefined initial case completions to exclude administrative closures. *Compare* EOIR 2017 YEARBOOK, *supra* note 26, at 7 ("Initial Case Completion (ICC) is the first dispositive decision rendered by an immigration judge . . . . An order . . . administratively closing a case is not a dispositive decision and, thus, does not constitute a case completion."), *with* EOIR 2016 YEARBOOK, *supra* note 47, at A1 ("Immigration court completions include immigration judge decisions and other completions (such as administrative closings) . . . ."). More recently published statistics on initial case completions are therefore not comparable. *Compare, e.g.*, EOIR 2016 YEARBOOK, *supra* note 47, at C2 (listing 137,875 initial case completions for fiscal year 2016), *with* EOIR 2017 YEARBOOK, *supra* note 26, at 10 (listing just 128,201 initial case completions for fiscal year 2016).

53 EOIR 2013 YEARBOOK, *supra* note 9, Glossary of Terms at 7. Under this approach, EOIR does not count decisions to change venue or transfer a case as an initial case completion.

case completion, some cases continue onto what EOIR calls a "subsequent case completion," such as when a case is remanded after appeal or reopened by the immigration judge.[54]

Table 1: EOIR Reporting of *In Absentia* Removal at the Initial Case Completion Stage, by Fiscal Year (2009–2016) (All Custody Status)[55]

Fiscal Year	Number	Change (%)
2009	23,269	—
2010	25,059	+8
2011	22,567	-10
2012	19,449	-14
2013	21,493	+11
2014	26,131	+22
2015	38,329	+47
2016	34,268	-11

Table 1 reproduces the numbers provided in the EOIR Statistics Yearbooks for *in absentia* removal orders issued by immigration judges at the initial case completion stage from 2009 to 2016. As seen in Table 1, the annual number of *in absentia* orders fluctuated from year to year, decreasing in some years while increasing in others. During this period, *in absentia* removals reached a low of 19,449 in 2012 and a high of 38,329 in 2015.[56]

B. *Calculating the* In Absentia *Removal Rate*

The discussion thus far has presented the annual number of *in absentia* removal orders issued each year, as reported by EOIR. But what was the *in absentia* removal rate—that is, the percentage of cases that ended in an *in absentia* removal order?

Since EOIR adopted its initial case completion approach with the 2013 Statistics Yearbook, it has measured the *in absentia* rate by dividing the

54 EOIR defines a "subsequent case" as a proceeding "that begins when: 1) the immigration judge grants a motion to reopen, reconsider, or recalendar; or 2) the Board of Immigration Appeals issues a decision to remand and ends when the immigration judge renders a determination." *Id.*, Glossary of Terms at 11.

55 Table 1 relies on the *in absentia* removals reported by EOIR in its Statistics Yearbooks for fiscal years 2009 through 2016 at the initial case completion stage. We selected fiscal years 2009 through 2016 for analysis because EOIR used a consistent method for measuring initial case completions in these publications. *See supra* note 52. We obtained these data for fiscal years 2012 to 2016 from the 2016 Yearbook and added data for fiscal years 2009 to 2011, unavailable in the 2016 Yearbook, from the 2013 Yearbook. EOIR 2013 YEARBOOK, *supra* note 9, at P1; EOIR 2016 YEARBOOK, *supra* note 47, at P1.

56 EOIR 2016 YEARBOOK, *supra* note 47, at P1.

number of *in absentia* removals issued at the initial case completion stage by the total number of initial immigration judge decisions issued during the fiscal year.[57] EOIR defines an initial immigration judge decision as the first dispositive decision issued by the immigration judge in a case.[58] Immigration judges have a number of ways to dispose of a case on the merits: they may order removal, grant relief from removal, or terminate the case. As already established, removal decisions may be issued *in absentia* or with the individual present in court (not *in absentia*).

57 *See* EOIR 2013 YEARBOOK, *supra* note 9, at P1 (calculating the "*in absentia* rate" as the percentage of initial immigration judge completions that end in *in absentia* removal); *see also* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2014 STATISTICS YEARBOOK P1 (2015), https://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf [https://perma.cc/U8DF-4JVS]; EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2015 STATISTICS YEARBOOK P1 (2016), https://www.justice.gov/eoir/page/file/fysb15/download [https://perma.cc/WH27-CH6J]; EOIR 2016 YEARBOOK, *supra* note 47, at P1. Note that while the EOIR 2017 Yearbook uses a similar approach, EOIR narrowed its definition of relevant case types and its calculation of relevant immigration judge completions. *See supra* note 52.

58 *See* EOIR 2016 YEARBOOK, *supra* note 47, at C1 ("In rendering a decision, the immigration judge may order the alien removed from the United States, grant some form of relief, or terminate the case."). In some cases, there is a subsequent case decision after this initial decision. *See id.* at A8 fig.3. Subsequent decisions are not analyzed in EOIR's *in absentia* measurements and are not presented here. *See id.* at P1-P4.

Table 2: *In Absentia* Removals as a Percentage of Initial Immigration Judge Decisions, by Fiscal Year (2009–2016) (All Custody Status)[59]

	Initial Immigration Judge Decisions		
Fiscal Year	*In Absentia*	Not *In Absentia*	EOIR *In Absentia* Rate
2009	23,269	193,039	11%
2010	25,059	181,099	12%
2011	22,567	180,141	11%
2012	19,449	150,495	11%
2013	21,493	120,822	15%
2014	26,131	109,456	19%
2015	38,329	100,081	28%
2016	34,268	103,607	25%
Summary Statistics			
Total	210,565	1,138,740	16%
Average	26,321	142,343	16%
(SD)	(6,578)	(38,542)	(6%)

Table 2 presents EOIR's calculations of the *in absentia* rate, using data published in the EOIR Statistics Yearbooks. The second column (labeled "*In Absentia*") reproduces the annual totals of *in absentia* orders that were presented in Table 1. The third column (labeled "Not *In Absentia*") contains the number of initial immigration judge decisions that were not issued *in absentia*. The final column presents EOIR's *in absentia* removal rate—the percentage of all initial immigration judge decisions that were issued *in absentia*. Over the period measured, the rate varied from a low of 11% in 2009 to a high of 28% in 2015.[60] Over the entire period for which data is available in the EOIR Yearbooks (2009–2016), the aggregate and average *in absentia* rate using EOIR's initial immigration judge decision method were 16%.

59 Table 3 relies on the 2013 and 2016 Yearbooks' reporting of *in absentia* removal orders and the *in absentia* rate. *See* EOIR 2013 YEARBOOK, *supra* note 9, at P1-P4; EOIR 2016 YEARBOOK, *supra* note 47, at P1-P4. Based on these raw numbers, we also display total and average immigration judge decisions and *in absentia* rates, statistics that are not presented in EOIR Yearbooks. For the purposes of calculating the average EOIR *in absentia* removal rate, means were weighted by the total number of cases in each year.

60 We note that during this time period the overall number of initial immigration judge decisions declined, a topic with important structural implications for measuring *in absentia* removal. *See infra* Figure 1 and accompanying text.

C. *Custody Status*

EOIR's annual publications provide one additional data point for understanding how *in absentia* orders are distributed: custody status. In immigration court, there are three different possible custody statuses. First, some individuals are detained throughout their entire case.[61] Second, some individuals are detained but later released from custody on bond or on their own recognizance.[62] Third, some individuals are never detained at any point during their case.[63]

As reported in the EOIR Yearbooks and summarized in Table 3, the lion's share of *in absentia* removal orders (69%) were issued to individuals who were never subjected to detention. An additional 30% of *in absentia* removal orders were issued to those who were released from detention on bond or on their own recognizance.[64]

---

61 Individuals who were detained throughout their removal cases comprised 50% (n = 670,586) of the 1,349,305 initial immigration judge decisions in the EOIR Yearbooks from fiscal year 2009 to 2016. *See* EOIR 2013 YEARBOOK, *supra* note 9, at P1, P4 (providing the total number of immigration judge decisions for fiscal years 2009–2011 and the total number of immigration judge decisions for nondetained respondents for fiscal years 2009–2011); EOIR 2016 YEARBOOK, *supra* note 47, at P1, P4 (providing the total number of immigration judge decisions for fiscal years 2012–2016 and the total number of immigration judge decisions for nondetained respondents for fiscal years 2012–2016). For essential background on how detention has been used to control U.S. borders, see Lenni B. Benson, *As Old As the Hills: Detention and Immigration*, 5 INTERCULTURAL HUM. RTS. L. REV. 11 (2010).

62 Individuals who were released from custody comprised 14% (n = 192,184) of the 1,349,305 initial case completions in the EOIR Yearbooks from fiscal year 2009 to 2016. EOIR 2013 YEARBOOK, *supra* note 9, at P1, P3 (for fiscal years 2009–2011); EOIR 2016 YEARBOOK, *supra* note 47, at P1, P3 (for fiscal years 2012–2016).

63 The term "never detained" means that EOIR has no record of the individual being detained during the pendency of the removal case. EOIR 2013 YEARBOOK, *supra* note 9, Glossary of Terms at 8. According to statistics published in the EOIR Yearbooks, 36% (n = 486,535) of the 1,349,305 initial immigration judge decisions from fiscal year 2009 to 2016 were of individuals who were never detained. EOIR 2013 YEARBOOK, *supra* note 9, at P1, P2 (for fiscal years 2009–2011); EOIR 2016 YEARBOOK, *supra* note 47, at P1, P2 (for fiscal years 2012–2016). We acknowledge, however, that some individuals who were never detained during their removal case may have been detained at some point by immigration authorities.

64 For a more detailed discussion of the process of release from immigration court on bond, see Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 LAW & SOC'Y REV. 117 (2016).

Table 3: *In Absentia* Removal Orders Among Initial Immigration Judge Decisions, by Custody Status and Fiscal Year (2009–2016)[65]

Fiscal Year	Never Detained	Released	Detained	Total
2009	18,710	4,189	370	23,269
2010	20,458	4,199	402	25,059
2011	15,710	6,557	300	22,567
2012	11,676	7,689	84	19,449
2013	12,053	9,349	91	21,493
2014	15,357	10,656	118	26,131
2015	26,912	11,346	71	38,329
2016	24,471	9,722	75	34,268
Total	145,347	63,707	1,511	210,565

A small number of *in absentia* orders involved individuals in detention. As seen in Table 3, 1,511 *in absentia* orders were issued in detention between 2009 and 2016. Surprisingly, these *in absentia* orders occurred despite the fact that individuals were in detention and reliant on the government to transport them to their hearings. According to EOIR's statistics division, these *in absentia* orders were generally issued when the detained respondent was unable to come to immigration court "because of illness or transportation problems."[66] The annual number of *in absentia* orders in detention has declined in recent years and since 2015 has been fewer than one hundred orders per year.[67] The issuance of *in absentia* orders to detainees who were not transported to their hearings or deemed too ill to attend raises serious due process questions and should be the subject of future study.[68]

In Table 4, we summarize the data published by EOIR in its Statistics Yearbooks to calculate the overall *in absentia* removal rate (among initial immigration judge decisions) for never-detained and released respondents.

65 Table 3 relies on the 2013 and 2016 Yearbooks' reporting of *in absentia* removal orders for both never-detained and released respondents. *See* EOIR 2013 YEARBOOK, *supra* note 9, at P1-P3 (for fiscal years 2009–2011); EOIR 2016 YEARBOOK, *supra* note 47, at P1-P3 (for fiscal years 2012–2016). The EOIR Yearbooks do not publish *in absentia* numbers for detained respondents, but we were able to calculate those amounts by subtracting the totals for "never detained" and "released" *in absentia* removals from the overall published totals. *See supra* note 61.

66 *See, e.g.*, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2003 STATISTICAL YEAR BOOK H2 (2004), https://www.justice.gov/sites/default/files/eoir/legacy/2008/04/18/fy03syb.pdf [https://perma.cc/D6Y8-V5QU] ("Failures to appear for detained cases occur very infrequently, generally only because of illness or transportation problems.").

67 *See supra* Table 3.

68 *Cf.* Evra, 25 I. & N. Dec. 79, 79-80 (B.I.A. 2009) (allowing a noncitizen ordered removed *in absentia* while in state custody to seek rescission of that removal order because the failure to appear had been "through no fault of the alien"). For an argument that detention should be abolished, see CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, MIGRATING TO PRISON: AMERICA'S OBSESSION WITH LOCKING UP IMMIGRANTS 139-63 (2019).

As seen in Table 4, EOIR's *in absentia* rate fluctuated from year to year and was generally somewhat lower for individuals who were never detained (30% from 2009 to 2016), compared to those who were released from custody on bond or on their own recognizance (33%).

Table 4: *In Absentia* Removal Rate as Calculated by EOIR, by Custody Status and Fiscal Year (2009–2016)[69]

	Never Detained			*Released*		
	Initial IJ Decisions			Initial IJ Decisions		
Fiscal Year	*In Absentia*	Not *In Absentia*	EOIR *In Absentia* Rate	*In Absentia*	Not *In Absentia*	EOIR *In Absentia* Rate
2009	18,710	46,773	29%	4,189	13,605	24%
2010	20,458	52,502	28%	4,199	15,087	22%
2011	15,710	52,154	23%	6,557	16,666	28%
2012	11,676	44,972	21%	7,689	17,256	31%
2013	12,053	40,502	23%	9,349	18,457	34%
2014	15,357	32,613	32%	10,656	16,381	39%
2015	26,912	34,026	44%	11,346	15,983	42%
2016	24,471	37,646	39%	9,722	15,042	39%
Summary Statistics						
Total	145,347	341,188	30%	63,707	128,477	33%
Average	18,168	42,649	30%	7,963	16,060	33%
(SD)	(5,545)	(7,696)	(8%)	(2,782)	(1,496)	(7%)

Given that *in absentia* removal in detention is so rare, EOIR is correct to also provide calculations of *in absentia* removal by custody status. Doing so provides a more complete picture of how often these orders are issued by judges. Yet EOIR is only using one method—the initial immigration judge

69 All raw data used for the calculations in Table 4 were obtained from the EOIR Yearbooks. *See* EOIR 2013 YEARBOOK, *supra* note 9, at P2-P3 (for fiscal years 2009–2011); EOIR 2016 YEARBOOK, *supra* note 47, at P2-P3 (for fiscal years 2012–2016). The columns labeled "EOIR *In Absentia* Rate" in Table 4 calculate the *in absentia* removal rate using EOIR's measurement of *in absentia* removals as a percentage of initial immigration judge (IJ) decisions. Table 4, like the EOIR Yearbooks, does not include data on detained cases because the *in absentia* numbers are too low for meaningful display. *See supra* Table 3. Based on the raw numbers of immigration judge decisions published in the Yearbooks, Table 4 also calculates the total and average immigration judge decisions and *in absentia* rates, statistics that are not presented in EOIR's Yearbooks. For the purposes of the average EOIR *in absentia* removal rate, means were weighted by the total number of cases in each year.

decision approach. As we develop in Part II, this choice in method presents a limited view of the patterns in immigration courts.

II. ALTERNATIVE METHODS FOR MEASURING *IN ABSENTIA* REMOVAL

Part I introduced the basic statistics on *in absentia* removal presented by EOIR in its statistical reports. In Part II, we analyze in more detail the decisions that EOIR made in calculating the prevalence of *in absentia* removal in the immigration courts and develop alternative methods for measuring *in absentia* removal that we believe improve the overall understanding of how and when these orders occur in immigration courts.

We approach this task by analyzing the EOIR court data used to create the EOIR Statistics Yearbooks. However, unlike in Part I where we simply presented the numbers published in the Yearbooks, in Part II we conduct our own original analysis. We begin by describing our preparation of the EOIR data for analysis.

A. *EOIR Court Data*

We obtained the data for analysis directly from EOIR. As of July 2018, rather than requiring a written request under the Freedom of Information Act, EOIR began making its full database of immigration court data available on its web page for the public to download and analyze.[70] EOIR periodically updates these data, and we analyzed data tables made available by EOIR as of November 2, 2018. These data included 8,253,223 immigration court proceedings, with completed and pending cases dating back to 1951.[71]

Each of these immigration court proceedings contains one or more hearings. Immigration hearings categorized as "individual" hearings (also

---

70 According to the "EOIR Case Data" section on EOIR's homepage:

> In 2008, EOIR began receiving requests from a university-affiliated data clearinghouse for large, raw data files from the agency's case file electronic database. As EOIR has received at least three FOIA requests for this information, the FOIA Improvement Act of 2016 requires the agency to make the records available for public inspection in an electronic format.

Executive Office for Immigration Review, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir [https://perma.cc/86LC-GVMH] (last visited Jan. 10, 2020).

71 We found no indications of reliability issues in the data we analyzed (through November 2, 2018) beyond common and correctible errors in data formatting (for example, extraneous tabs moving data over a column). EOIR has been criticized, however, for its handling of more recent data provided to the public. *See Incomplete and Garbled Immigration Court Data Suggest Lack of Commitment to Accuracy*, TRAC IMMIGRATION (Oct. 31, 2019), http://trac.syr.edu/immigration/reports/580 [https://perma.cc/RW26-GSL7] (finding gaps in EOIR's data verification procedures that led to the release of unreliable data for September 2019).

commonly known as "merits" hearings) are scheduled for an immigration judge to adjudicate the substance of the respondent's claim (for example, asylum or cancellation of removal).[72] All other hearings are generally referred to as "initial master" hearings (also commonly known as "master calendar" hearings), which are scheduled to allow for general administration of the cases (including, for example, the taking of pleadings, requests for time to find an attorney or time to prepare a case, and the filing of applications for relief).[73]

To conduct our analysis, we first limited these data to those cases with an initial immigration judge completion occurring between fiscal years 2008 and 2018.[74] We chose 2008 as the start date for our analysis in order to limit our analysis to EOIR data entered into the agency's Case Access System for EOIR (CASE), which was adopted in 2006 and was phased in through 2007.[75] In total, our data contained 3,945,781 immigration court proceedings from the eleven-year period between 2008 and 2018.[76]

We next limited our sample to the 3,852,745 removal proceedings in our data.[77] As mentioned in Part I, removal is by far the most common proceeding

72 *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL 86 (2018), https://www.justice.gov/eoir/page/file/1084851/download [https://perma.cc/57QL-C32K] [hereinafter IMMIGRATION COURT PRACTICE MANUAL] (defining "individual calendar hearings" as "[e]videntiary hearings on contested matters"). In our data, very few cases of *in absentia* removal (7%) occurred at an individual hearing scheduled to address the merits of a respondent's claim (n = 22,877 of 315,780 total *in absentia* removals).

73 *See id.* at 73-79 (describing the purposes of master calendar hearings).

74 The federal government's fiscal year begins on October 1 and ends on September 30 of the following year. *See, e.g.*, *Federal Budgets by Year*, U.S. GOV'T PUBLISHING OFFICE, https://bookstore.gpo.gov/taxonomy/term/779/fiscal-year-2017-budget [https://perma.cc/3L4N-UUS2] (last visited Jan. 10, 2020).

75 *See* NINA SIULC ET. AL, VERA INST. OF JUSTICE, LEGAL ORIENTATION PROGRAM: EVALUATION AND PERFORMANCE AND OUTCOME MEASUREMENT REPORT, PHASE II, at 74-75 (2008), http://www.justice.gov/eoir/reports/LOPEvaluation-final.pdf [https://perma.cc/W9YT-53CG] (discussing the 2006–2007 transition to CASE from the earlier case management system, known as ANSIR); U.S. Dep't of Justice, Exec. Office for Immigration Review, Privacy Impact Assessment: Case Access System for EOIR 2 (Sept. 14, 2006), https://www.justice.gov/sites/default/files/opcl/docs/eoir_pia.pdf [https://perma.cc/2B7L-277S] (explaining that the then-new CASE system "will integrate the stove-piped legacy databases for the Immigration Courts and the Board of Immigration Appeals"). Using the Freedom of Information Act, we have gathered and reviewed training manuals and reference guides prepared for training judges and court administrators on how to use the CASE system. Ingrid V. Eagly, Steven Shafer & Jana Whalley, *Detaining Families: Asylum Adjudication in Family Detention—Online Appendix*, UCLA SCHOOL OF LAW: HUGH AND HAZEL DARLING LAW LIBRARY, https://libguides.law.ucla.edu/detainingfamilies [https://perma.cc/8ZZS-KEYU] (last visited Jan. 10, 2020).

76 If no initial immigration judge completion had occurred between 2008 and 2018, we still included the case if the first scheduled hearing occurred during or after fiscal year 2008. Initial immigration judge completions include both merits immigration judge decisions and all other completions (for example, administrative closures).

77 The term "removal proceeding" has been in use since 1997 and refers to immigration court cases for excluding a person seeking to enter the U.S. or deporting a person who is already present in the United States. *See* Judulang v. Holder, 565 U.S. 42, 45-46 (2011) (describing the

type, constituting 98% of the 3,945,781 proceedings between 2008 and 2018.[78] Because an individual immigration case may have more than one proceeding, these 3,852,745 removal proceedings comprised 2,732,988 unique immigration cases.[79] These cases include all custody statuses: never detained, released, and detained.[80] We call this analytical sample the All Custody Removal Sample.

Next, we created a Nondetained Removal Sample, which we limited to individuals who were not detained at the time of their initial case completion. This sample includes individuals who were never detained, as well as those who were detained at some point, but later released from custody. Our Nondetained Removal Sample contains 2,797,437 removal proceedings comprising 1,829,049 unique immigration cases.

B. *The Changing Immigration Court Docket*

EOIR chooses to measure the *in absentia* removal rate based on the narrow pool of immigration judge decisions.[81] This approach, however, overlooks the increasing stream of other immigration judge completions (for example,

change in language that accompanied 1996 amendments to federal immigration law, which folded "exclusion proceeding[s]" and "deportation proceeding[s]" into "a unified procedure, known as a 'removal proceeding'").

78 Immigration courts also handled other types of proceedings during this period, including credible fear review, reasonable fear review, claimed status review, asylum only, and withholding only. *See* EOIR 2016 YEARBOOK, *supra* note 47, at B1. The EOIR data also included bond redetermination proceedings that occurred before a document called a "notice to appear" was filed, known as "zero bond" cases. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, UNIFORM SYSTEM DOCKETING MANUAL I-11 (2013), https://libguides.law.ucla.edu/ld.php?content_id=38100361 [https://perma.cc/3ZNN-C9UB] (explaining that bond redetermination requests "are separate from the removal hearing process that begins with the filing of the Notice to Appear at the Immigration Court"). We removed these zero bond proceedings from all analyses.

79 For cases with a 2008 initial case completion, we included any earlier non-initial case completions that occurred before 2008 (for example, transfer). We counted as pending those cases completed in fiscal year 2019 (that is, those that were completed between October 1, 2018, and November 2, 2018, when the data were made available).

80 Each immigration court proceeding is classified by EOIR with one of three codes for custody status. *See* EOIR 2013 YEARBOOK, *supra* note 9, Glossary of Terms at 5 (defining "Custody Status" as "[w]hether or not an alien is detained" and defining the three custody statuses identified within the Yearbook). In the EOIR data we analyzed, a detained respondent is coded as "D." A respondent who is initially detained but later released—on bond or some alternative type of condition—is coded as "R." Finally, if EOIR has no record of a respondent ever having been detained, the code "N" is used. Some respondents in our sample had multiple custody statuses over the course of several proceedings. In these instances, we classified the *in absentia* removal order based on the custody status at the time that the *in absentia* removal order was issued.

81 As explained earlier and developed further in this Section, an "immigration judge decision" is defined by EOIR as the first dispositive decision in a removal case and includes removal, termination, or relief. *See supra* note 58 and accompanying text.

administrative closures) and pending cases on the court's docket.[82] These additional categories of cases, we argue, must be considered when addressing whether immigrants are engaged in the court process. Determining how to measure the *in absentia* removal rate, then, first requires familiarity with the categories of cases that flow through the immigration court.

As discussed in Part I, immigration judge decisions are decisions on the merits to order removal, grant relief, or terminate the case. Yet immigration judge decisions are not the only way that immigration court cases are adjudicated. Administrative closure is a discretionary docket-management tool that immigration judges have used for decades.[83] Through this practice, a judge removes a case from the active docket, thereby putting the case on indefinite hold and allowing the noncitizen to remain in the United States.[84] EOIR does not, however, include administrative closures in its *in absentia* calculations.

By far the largest category of immigration court cases today are pending cases.[85] Pending cases are not yet resolved and have ongoing hearings to rule on motions and applications for relief. Were immigration cases quickly decided on their merits, excluding pending cases when measuring the *in absentia* rate as EOIR does might make sense. But given the immense and

---

82 As we explain in this Section, cases that are administratively closed by the immigration judge are not considered by EOIR to have reached an "immigration judge decision." *See infra* notes 91–92 and accompanying text.

83 Memorandum from Brian M. O'Leary, Chief Immigration Judge, Exec. Office for Immigration Review, to All Immigration Judges, All Court Administrators, All Attorney Advisors and Judicial Law Clerks, and All Immigration Court Staff, Operating Policies and Procedures Memorandum 13-01: Continuances and Administrative Closure 3 (Mar. 7, 2013), https://libguides.law.ucla.edu/ld.php?content_id=38258569 [https://perma.cc/643J-CE6J].

84 *Id.* at 2 (instructing immigration judges to grant requests for administrative closure "in appropriate circumstances"); *see also* IMMIGRATION COURT PRACTICE MANUAL, *supra* note 72, Glossary at 1 (2017) ("Once a case has been administratively closed, the court will not take any action on the case until a request to recalendar is filed by one of the parties."). In 2018, the Attorney General issued a decision to greatly restrict the practice of administrative closure. Castro-Tum, 27 I. & N. Dec. 271 (A.G. 2018). However, on August 29, 2019, the Fourth Circuit Court of Appeals abrogated *Castro-Tum*, finding that the immigration law unambiguously permits immigration judges to control their own dockets. Romero v. Barr, 937 F.3d 282, 286, 292-94 (4th Cir. 2019).

85 *See infra* Figure 1. In 2017, immigration courts in some jurisdictions began to create "status dockets" to monitor cases in which respondents are pursuing relief outside of immigration court. *See* CATHOLIC LEGAL IMMIGRATION NETWORK, INC., PRACTICE ADVISORY: SEEKING CONTINUANCES IN IMMIGRATION COURT IN THE WAKE OF THE ATTORNEY GENERAL'S DECISION IN *MATTER OF L-A-B-R* 39 (2018), https://cliniclegal.org/resources/removal-proceedings/practice-advisory-matter-l-b-r-27-dec-405-ag-2018 [https://perma.cc/U6VH-3YAX]. Only recently has EOIR published guidance on status dockets. Memorandum from James R. McHenry III, Dir., Exec. Office for Immigration Review, to All Immigration Court Personnel, Policy Memorandum 19-13: Use of Status Dockets (Aug. 16, 2019), https://libguides.law.ucla.edu/ld.php?content_id=51480401 [https://perma.cc/86UF-UKN3]. Given how new this practice is and the jurisdictional variation in its implementation, we do not analyze status dockets in this Article.

growing backlog in the immigration courts,[86] cases can drag on for many years before a decision is reached.[87] Additionally, as we will discuss, the data suggest that immigrants are engaged in the court process as their cases wind their way through the long court process.

Relying on the All Custody Removal Sample, we investigate these changes to the immigration court docket. Figure 1 depicts trends in immigration court cases over the past eleven years. Understanding these different case trends is fundamental to identifying how best to measure *in absentia* removal.

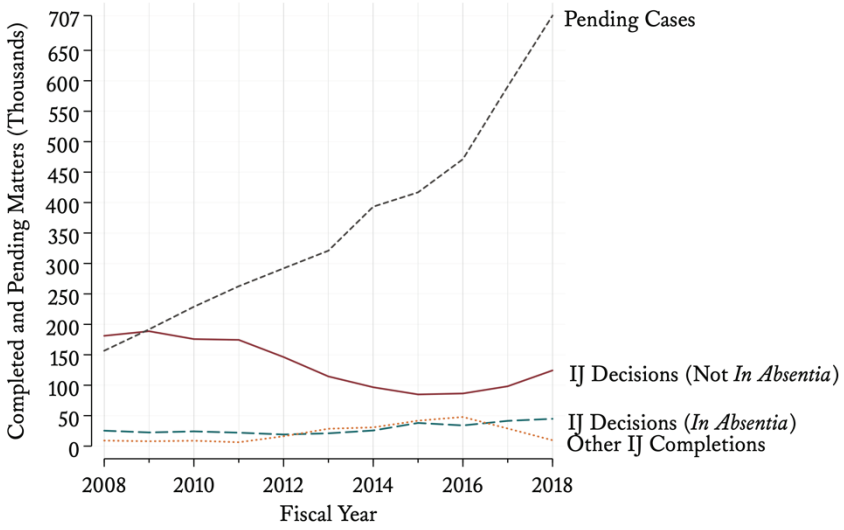
The first category of cases included in Figure 1 is immigration judge decisions. We separate immigration judge decisions into two categories: those issued *in absentia* and those not issued *in absentia*. The lower dashed line (labeled "IJ Decisions (*In Absentia*)") measures the annual number of *in absentia* removal orders issued in the initial immigration judge completion stage of the case. The solid line (labeled "IJ Decisions (Not *In Absentia*)") tracks the initial immigration judge decisions made by immigration judges that were not issued *in absentia*. Cases ending with a decision not *in absentia* include both individuals who were ordered removed and those who obtained relief.[88] One crucial observation from Figure 1 is that initial immigration judge decisions (the total issued *in absentia* and not *in absentia*) have declined from 206,538 in 2008 to 169,174 in 2018, with a low of 120,414 in 2016. That is, despite growing caseloads, immigration judges are much less likely to reach an on-the-merits decision today than they were eleven years ago.

86 *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-438, IMMIGRATION COURTS: ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 22 (2017), https://www.gao.gov/assets/690/685022.pdf [https://perma.cc/54GQ-LE2C] (finding that EOIR's case backlog more than doubled between fiscal years 2006 and 2015).

87 In our data, new immigration court dates for nondetained cases were set out as late as 2025.

88 Eighty-two percent of the initial immigration judge decisions in our data were not *in absentia* (n = 1,471,662 of 1,789,834). Of these non-*in absentia* decisions, 58% of respondents were ordered removed (n = 848,979), 16% obtained relief (n = 231,646), and 14% were granted voluntary departure (n = 210,997). The remaining 12% received termination, prosecutorial discretion, or other merits outcomes (n = 180,040).

Figure 1: Case Trends in Immigration Court, by Fiscal Year (2008–2018) (All Custody Status)[89]



A second case type shown in Figure 1 are those that are not decided on their merits, a category that EOIR has referred to as "other completions."[90] During our study period, 96% of "other completions" (n = 226,130 of 236,007) were administrative closures.[91] Other completions also include a few cases resulting in failure to prosecute and temporary protected status.[92]

---

89 Figure 1 presents fiscal year totals for removal cases, including both detained and nondetained cases. These completions include initial immigration decisions (that is, on the merits) and other immigration judge completions (for example, administrative closures). Changes of venue or transfers are not counted by EOIR as an initial case completion. We excluded from pending calculations cases that became pending after the initial completion (for example, a case recalendared after an administrative completion that is still pending), and therefore our estimates of pending cases are conservative.

90 *See* EOIR 2016 YEARBOOK, *supra* note 47, at C5 ("Cases that are not decided on their merits are classified as other completions."). Almost all other completions (n = 225,198 of 236,007 total completions) during our study period involved individuals who were not detained at the time of the judge's decision to close the case.

91 During the time period of our study, administrative closure was understood by the immigration courts as "a legitimate method of removing a case from the court's active docket" and "preserving limited administrative resources." *See* Memorandum from Brian M. O'Leary, *supra* note 83, at 2 (providing "guidance to assist immigration judges with fair and efficient docket management practices related to . . . requests for administrative closures and continuances"). We note that in the 2017 Statistics Yearbook, EOIR discontinued referring to administrative closures as "initial case completions." *See* EOIR 2017 YEARBOOK, *supra* note 26, at 7 ("An order . . . administratively closing a case is not a dispositive decision and, thus, does not constitute a case completion.").

92 Other completions are defined in the data by the decision type entry "O" in the "DecType" field. For these other completions, the detailed decision is found by matching the proceeding decision code ("DecCode") with the detailed description ("DecDescription") in the "tblLookupCourtDecision" lookup table provided by EOIR.

The lower dotted line in Figure 1 (labeled "Other IJ Completions") contains these "other completions."[93] As seen in Figure 1, after years of steady increases, other completions reached a high of 47,877 in 2016, but began to decline after President Trump was elected.[94] In a controversial decision issued at the end of our study period in 2018, former Attorney General Jeff Sessions ruled that immigration judges lacked authority to administratively close cases unless specifically provided for by a regulation or an existing settlement agreement.[95]

A third case type of growing importance is pending cases. The top short-dashed line of Figure 1 (labeled "Pending Cases") shows the skyrocketing number of pending cases in immigration courts. The number of such cases has increased by more than 350%, from 156,714 pending cases in 2008 to 707,147 in 2018. Of these 707,147 pending cases, 673,576 involved individuals who were never detained or released from custody.

The similarities and differences among these categories of cases—immigration judge decisions issued *in absentia*, immigration judge decisions issued not *in absentia*, other immigration judge completions (for example, administrative closures), and pending cases—provides necessary context for deciding how to measure *in absentia* removal. We first note that initial immigration judge decisions issued *in absentia* have several distinct characteristics. As seen in Table 5, while only 15% of those removed *in absentia* had attorneys, 86% of those who were not removed *in absentia* at the time of the immigration judge decision had attorneys.[96] While only 14% of those removed *in absentia* had filed an application for relief from removal (such as

93 In order to count each case only once, our measurements of other completions do not include decisions to transfer a case or change venue. We note that prior to 2013 EOIR included transfers and changes of venue in its count of "other completions." *See* EOIR 2012 YEARBOOK, *supra* note 39, at D1 ("Administrative closures and cases transferred to a different hearing location or granted a change of venue are counted as 'other completions.'"); *see also id.* at D3 & fig.6 (including "Transfer" and "Change of Venue" completions in the total count of "Other Completions by Disposition"). However, beginning in 2013, EOIR changed its method for calculating other completions to eliminate the large category of cases that ended in transfer or change of venue. *See* EOIR 2013 YEARBOOK, *supra* note 9, at C4 & fig.6.

94 For a compelling critique of the growing White House influence over the decisionmaking of immigration courts, see Catherine Y. Kim, *The President's Immigration Courts*, 68 EMORY L.J. 1, 34-48 (2018).

95 Castro-Tum, 27 I. & N. Dec. 271, 271 (A.G. 2018). *But see* Romero v. Barr, 937 F.3d 282, 294-97 (4th Cir. 2019) (concluding that *Castro-Tum* is unambiguously contrary to the federal immigration law).

96 We measured representation by whether a Notice of Entry of Appearance Form (known as a "Form EOIR-28") was filed in the case. *See infra* notes 166–168 and accompanying text. For cases that reached initial case completion, we counted the respondent as represented if the form was filed on or before the date of the case completion. If the EOIR-28 was filed after the initial case completion, we still counted the individual as represented if an attorney appeared in one or more hearings in the relevant proceeding. We followed this same method in an earlier article. *See* Eagly & Shafer, *supra* note 51, at 79-80.

asylum), 63% of those present in court at the time of the immigration decision filed an application for relief from removal.[97]

An additional key difference between cases that ended *in absentia* and those that did not is in the total case time and number of hearings. As seen in Table 5, cases ending with *in absentia* removal were completed in a median of 218 days, much faster than the median of 583 days for immigration judge decisions that did not end *in absentia*.[98] The speed of *in absentia* cases, as Table 5 also highlights, means that they are concluded in fewer hearings. While *in absentia* cases had a median of only two hearings, cases that did not end *in absentia* had a median of four hearings.

Table 5: Descriptive Statistics of Case Types (2008–2018) (Nondetained Only)[99]

	IJ Decisions			
	In Absentia	Not *In Absentia*	Other IJ Completions	Pending
Represented	15%	86%	85%	67%
Application for Relief	14%	63%	52%	57%
Case Length				
180 days or more	56%	87%	86%	81%
Median days	218	583	667	600
Mean days	362	736	798	803
(SD)	(424)	(591)	(617)	(698)
Total (N)	*316,089*	*614,182*	*225,198*	*673,580*
Number of Court Hearings				
4 or more hearings	17%	54%	51%	41%
Median hearings	2	4	4	4
Mean hearings	2.3	4.6	4.4	4.3
(SD)	(2.0)	(3.2)	(3.2)	(3.1)
Total (N)	*315,780*	*611,385*	*223,960*	*672,674*

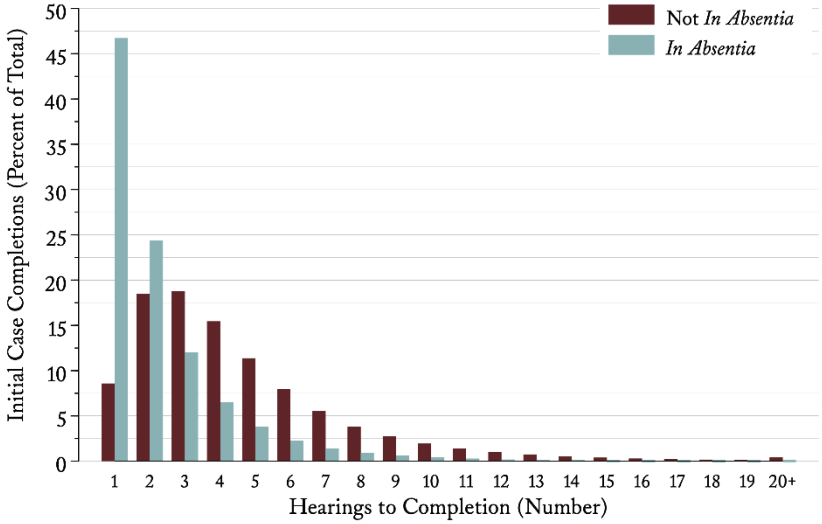
97 Application for relief is operationalized by whether the respondent filed for any form of relief with the court. For purposes of our analysis, we did not consider voluntary departure to be a form of relief. This approach follows that adopted by EOIR, which considers voluntary departure to be a form of removal, not of relief. *See, e.g.,* EOIR 2016 YEARBOOK, *supra* note 47, at C2 ("Orders of voluntary departure are counted as removals.").

98 We measured days to completion based on the earliest date in the EOIR system (for example, hearing date or input date) and the case completion date. For pending cases, we used the end of fiscal year 2018 (September 30, 2018) as the operative end date.

99 Because *in absentia* removal is something that generally occurs outside of detention, Table 5 relies on our Nondetained Removal Sample.

Figure 2 presents another way to visualize the difference between the number of hearings in the *in absentia* cases and other case types. As seen in Figure 2, 47% of *in absentia* removal orders occurred at the very first hearing in the case. The pattern was very different among initial case completions that did not result in an *in absentia* order. Less than 9% of non-*in absentia* decisions were completed at the first hearing.

Figure 2: Number of Hearings Before Initial Completion, by Decision Type (2008–2018) (Nondetained Only)[100]



At stake in deciding whether and how to include additional case categories in the analysis of *in absentia* removal is an honest assessment of immigrants' interactions with the court. Our analysis of court records at the hearing level in both administrative closures and pending cases, for example, reveals that respondents or their attorneys were attending these hearings. Specifically, we analyzed the hearing-level adjournment codes associated with the last two hearings in cases that ended in administrative closures during the study period of 2008 to 2018. We found that less than 2% of these hearings were adjourned due to either the respondent or the respondent's attorney not appearing at the hearing (n = 2,697 of 136,251).[101] EOIR has similarly verified

100 Figure 2 relies on hearing-level data to assess how many hearings had occurred at the time that the immigration judge initially completed the case. Of the 1,155,469 initial completions in our All Custody Removal Sample, only 4,344 cases (0.37%) were excluded from the analysis due to lack of hearing-level data.

101 *See* Memorandum from MaryBeth Keller, Chief Immigration Judge, Exec. Office for Immigration Review, to All Immigration Judges, All Court Administrators, All Attorney Advisors

that administrative closures are not associated with failures to appear.[102] We also analyzed hearing-level adjournment codes associated with the penultimate or last hearing in pending cases during our study period. Less than 1% (*n* = 5,497 of 667,436) exhibited a non-appearance at the penultimate or most recent hearing. These findings confirm that individuals in cases that are administratively closed or remain pending are indeed coming to court.

One possible objection to including other completions (for example, administrative closures) and pending cases in the calculation of the *in absentia* rate is that these are cases that could end with *in absentia* removal at some point in the future. While there is no doubt true that some will ultimately conclude *in absentia*, the data suggest that excluding these cases from the calculation is problematic. Other completions and pending cases are actually much more similar to cases that do not end *in absentia* and include significant involvement by the respondents in their court proceedings. As summarized in Table 5, other completions and pending cases have a high level of attorney involvement: 79% of other completions had counsel and 67% of pending cases had counsel. They also generally include applications for relief: 52% of other completions had at least one application for relief, as did 57% of pending cases. Notably, other completions and pending cases involve far more court days than *in absentia* cases: other completions had a median of 667 court days, while pending cases had a median of 600 days pending.[103] Other completions and pending cases also had an average of four hearings already, double that of cases that ended *in absentia* and on par with cases that did not end *in absentia*.[104]

These descriptive statistics reveal that individuals with administratively closed or pending cases are in fact interacting with the court system and attending their scheduled hearings. Indeed, if they had missed their scheduled hearings, they would have been removed *in absentia*. The fact that

---

and Judicial Law Clerks, All Support Staff, Operating Policies and Procedures Memorandum 17-02: Definitions and Use of Adjournment, Call-Up, and Case Identification Codes 3 (Oct. 5, 2017), https://libguides.law.ucla.edu/ld.php?content_id=38258359 [https://perma.cc/LTH2-DE7A] [hereinafter Adjournment Code Memorandum] (describing Adjournment Code 11, which signifies "Other No-Show by Alien/Alien's Attorney or Rep.," along with forty-seven other adjournment codes describing other reasons for granting adjournments).

102 *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, FY 2009 STATISTICAL YEAR BOOK H1 (2010), https://www.justice.gov/sites/default/files/eoir/legacy/2010/03/04/fy09syb.pdf [https://perma.cc/GP63-E4W6] (explaining that most administrative closures do not relate "directly to failure to appear").

103 *See supra* Table 5.

104 *Id.* It is important to acknowledge that the most recently filed pending cases in our study only had one hearing, or were still awaiting a hearing, and therefore were more vulnerable to future *in absentia* removal. Specifically, 11% of nondetained pending cases in our study both began in fiscal year 2018 and had only one hearing scheduled (*n* = 74,360 of 672,674).

the majority have counsel and applications for relief on file also shows they are invested in and engaging with the court process.[105]

As we established in Part I, EOIR measures the *in absentia* rate by dividing the number of *in absentia* removals by the total number of immigration judge decisions (issued *in absentia* and not *in absentia*).[106] Yet, by including only immigration judge decisions in their calculation, EOIR's measurement of the *in absentia* rate ignores the two categories of cases that we just discussed: other immigration judge completions and pending cases. Over the eleven-year study period (fiscal years 2008–2018), more than 10%—and in some years upward of 25%—of initial case completions issued were administrative closures.[107] Moreover, as the number of immigration judge decisions has declined, the number of pending cases has skyrocketed, exceeding 700,000 by the end of our study period. Appreciating these trends opens up new methods of measuring *in absentia* removal.

C. *Calculating the* In Absentia *Removal Rate*

With a fuller understanding of case status in immigration court, we now turn to calculating the *in absentia* rate using other completions and pending cases in the denominator.

The first alternative method considers *in absentia* orders as a percentage of all completed cases, which includes both immigration judge decisions and other immigration judge completions. We call this the "all case completions" method. Other completions, composed primarily of administrative closures, are ones in which we find that respondents are coming to court and not ordered removed *in absentia*, yet EOIR's current approach ignores them entirely.[108]

The second alternative method considers *in absentia* orders as a percentage of all pending and completed cases. We call this the "all matters" method. Given the very large number of pending cases in which individuals attend court hearings for years before a decision is reached, failing to include pending cases in the denominator misses the considerable population of individuals who are attending ongoing court hearings, and often represented by counsel and seeking relief.

Table 6 presents *in absentia* removal rates using EOIR's immigration judge method as well as the two alternative approaches just discussed. We find that the rates vary based on the method selected. First, applying EOIR's immigration judge decision method, the *in absentia* rate for the eleven-year period is 18%. In

105 *See supra* Table 5.

106 *See supra* note 57 & accompanying text.

107 *See infra* Table 6 and accompanying text.

108 Our analysis of adjournment codes for cases that were administratively closed underscores that these cases are not associated with failures to appear. *See supra* notes 101–102 and accompanying text.

other words, over the eleven-year period of the study, 82% of initial immigration judge decisions were issued with the respondent present in court.

Table 6 next shows the *in absentia* rate based on the all completion method. The annual rate using this method fluctuated between a low of 10% and a high of 25%, with percentages slightly lower when only immigration judge decisions are considered. Other completions are especially consequential, however, when calculating the proportion of *in absentia* removal for fiscal years 2015 and 2016. In those years, immigration judges used higher numbers of administrative closures to help manage their docket.[109] Eliminating these administrative closures from the *in absentia* rate, as EOIR has chosen to do, results in a higher *in absentia* rate while failing to account for large numbers of respondents who have actively engaged in the court process.

Finally, we calculate the *in absentia* rate for all matters—that is, both completed and pending cases. As the last column in Table 6 reveals, the *in absentia* rate using the all-matters measurement ranged from a low of 4% to a high of 7%. The yearly average over the period of our study (2008–2018) was 4% (*SD* = .01%). In other words, on average, every year 96% of respondents in removal proceedings in United States immigration courts were not removed *in absentia*.

109 AM. IMMIGRATION COUNCIL, AILA DOC. NO. 17061538, PRACTICE ADVISORY: ADMINISTRATIVE CLOSURE AND MOTIONS TO RECALENDAR 7 (2017), http://www.aila.org/File/DownloadEmbeddedFile/72088 [https://perma.cc/PR9Z-TKNB] (highlighting the "dramatic[]" increase in immigration judges' use of administrative closure in immigration court during the second term of the Obama Administration, especially after the 2014 "Johnson memo" directed government attorneys to "seek administrative closure for non-priority cases").

Table 6: *In Absentia* Removal Rate (Initial Case Completions), by Method and Fiscal Year (2008–2018) (All Custody Status)[110]

	IJ Decisions				*In Absentia* Removal Rate (Among . . .)		
Fiscal Year	*In Absentia*[111]	Not *In Absentia*	Other IJ Completions	Pending	IJ Decisions	All Completions	All Matters
2008	25,355	181,183	9,102	156,714	12%	12%	7%
2009	22,429	188,718	7,977	191,756	11%	10%	5%
2010	24,239	175,814	8,828	228,890	12%	12%	6%
2011	22,034	174,522	6,355	262,541	11%	11%	5%
2012	19,072	146,313	16,161	291,945	12%	11%	4%
2013	21,023	114,463	28,517	320,989	16%	13%	4%
2014	25,698	96,677	30,767	393,271	21%	17%	5%
2015	38,062	84,899	41,785	416,806	31%	23%	7%
2016	33,968	86,446	47,877	471,232	28%	20%	5%
2017	41,453	98,292	28,941	590,671	30%	25%	5%
2018	44,839	124,335	9,697	707,147	27%	25%	5%
Summary Statistics							
Total	318,172	1,471,662	236,007	707,147	18%	16%	12%
Average	28,925	133,787	21,455	366,542	18%	15%	4%
(SD)	(9,019)	(40,715)	(14,806)	(171,005)	(.08%)	(.06%)	(.01%)

The total *in absentia* rate from 2008 to 2018 using the all-matters method was 12%. This total rate of 12% is somewhat higher than the annual all-matters

110 Table 6 includes only those immigration judge decisions and other immigration judge completions that are part of the "initial case completion." An initial case completion is the first dispositive decision issued by the immigration judge in a case. *See* EOIR 2016 YEARBOOK, *supra* note 47, at C1. The measurements in Table 6 for "other IJ completions" include administrative closures and other decisions that administratively end the case (for example, dismissals for failure to prosecute and grants of temporary protected status). It does not include changes of venue or transfers. For purposes of calculating the "Total" *in absentia* removal rate with all pending cases for the entire eleven-year period, only the cases that remained pending in 2018 (n = 707,147) were included in the denominator. Finally, for the purposes of average *in absentia* removal rates, means were weighted by the total number of cases in each year.

111 To identify cases that resulted in *in absentia* removal, we selected those proceedings that had both (1) removal as the case outcome and (2) a "Y" (yes) indicator in the "absentia" data field. We note that all completed proceedings in the EOIR data contained a "Y" or "N" in the "absentia" data field. By definition, we did not consider a proceeding to have resulted in *in absentia* removal where the outcome was not removal (n = 3,777 of 319,866).

rate (which ranged from 4% to 7%) because we included in the overall denominator only those cases that were still pending as of the end of fiscal year 2018. Using the overall total, 88% of all removal respondents were not subject to *in absentia* removal during the eleven-year period from 2008 to 2018.

The all-matters method for measuring the *in absentia* rate is valuable because it captures the growing number of cases that are pending but not yet resolved. Due to large and growing court backlogs, cases can take years to resolve.[112] Not including these pending cases in the measurement of the *in absentia* rate results in over-counting of those cases that end with *in absentia* orders because *in absentia* decisions occur more quickly and involve fewer hearings,[113] and those that do not end *in absentia* can drag on for years. Only 11% of pending cases in our nondetained sample had just begun their cases in fiscal year 2018, suggesting that the vast majority of pending cases were active in the court system.

In conclusion, by eliminating administrative closures and pending cases from its published calculations, EOIR ignores a substantial population of respondents who came to court and attended all their court proceedings. In doing so, EOIR effectively inflates the overall *in absentia* rate. Our measurements show a different picture.

D. In Absentia *Removal by Custody Status*

Thus far, this Article has presented EOIR's data on the total number of *in absentia* removals along with three possible measurements for the *in absentia* removal rate. In this Section, we extend these three different measurement techniques to the Nondetained Removal Sample. We find similar patterns to those presented in the previous Section. That is, our all-matters and all-completions methods yield lower overall *in absentia* rates than the more limited immigration-judge-decision approach adopted by EOIR.

112 *See* David Wagner, *Asylum-Seekers in California Wait for Their Day in Immigration Court*, N.P.R. (Jan. 9, 2019, 5:25 AM ET), https://www.npr.org/2019/01/09/683328305/asylum-seekers-in-california-wait-for-their-day-in-immigration-court [https://perma.cc/JN7V-YRJN] (featuring asylum seekers who have been waiting years for a court decision).

113 *See supra* Table 5.

Table 7: *In Absentia* Removal Rate (Initial Case Completions), by Fiscal Year (2008–2018) (Nondetained Only)[114]

	IJ Decisions				*In Absentia* Removal Rate (Among . . .)		
Fiscal Year	*In Absentia*	Not *In Absentia*	Other IJ Completions	Pending	IJ Decisions	All Completions	All Matters
2008	24,882	60,337	8,020	144,996	29%	27%	8%
2009	22,071	57,640	6,803	178,156	28%	26%	6%
2010	23,852	64,357	7,883	212,053	27%	25%	6%
2011	21,739	65,417	5,235	246,153	25%	24%	5%
2012	18,990	60,344	14,994	275,132	24%	20%	4%
2013	20,940	56,727	27,243	303,015	27%	20%	4%
2014	25,587	46,655	29,845	372,884	35%	25%	5%
2015	37,994	45,467	41,003	393,651	46%	31%	6%
2016	33,896	47,579	47,071	443,658	42%	26%	5%
2017	41,374	45,684	28,055	559,855	48%	36%	5%
2018	44,764	63,975	9,046	673,580	41%	38%	5%
Summary Statistics							
Total	316,089	614,182	225,198	673,580	34%	27%	17%
Average	28,735	55,835	20,473	345,739	34%	27%	5%
(SD)	(9,092)	(7,990)	(14,877)	(163,990)	(8%)	(6%)	(1%)

Table 7 presents our *in absentia* findings for individuals who were released or never detained. The rates are highest when only immigration judge decisions are used as the denominator, somewhat lower when all completions are used, and significantly lower when pending cases are added into the calculation ("All Matters"). Consider, for example, the *in absentia* rates for 2018. The *in absentia* rate for nondetained respondents was 41% when only immigration judge decisions are considered, 38% as a proportion of all completed cases, and only 5% as a percentage of all matters.

114 Table 7 calculates the *in absentia* removal rate using three different methods: immigration judge decisions, all completions, and all matters. In calculating the average *in absentia* removal rates, means were weighted by the total number of cases in each year. The total *in absentia* rate for all matters includes only the cases that remained pending in 2018 in the denominator.

E. *Notice Issues and Reopening of* In Absentia *Removal Orders*

Another missing component of EOIR's approach to measuring *in absentia* is appreciation of whether respondents receive effective notice of the removal proceedings. Whether immigrants are made aware of their court hearings in accordance with due process cuts to the heart of who is considered at fault for a failure to appear. This Section analyzes the problem of lack of notice and investigates immigrants' efforts to reopen their removal orders issued without proper notice.

A 2018 United States Supreme Court decision, *Pereira v. Sessions*,[115] has drawn national attention to the chronic and widespread deficits in providing individuals notice of their immigration hearings.[116] In 2006, Wescley Fonseca Pereira was served with a charging document (known as a "notice to appear" or NTA) that did not contain the date and time of his immigration court hearing.[117] Instead, the document ordered Mr. Pereira, who came to the United States in 2000 and overstayed his visa, to appear in court at a date and time that would be set in the future.[118]

Over a year later, the immigration court mailed a notice containing the actual date and time of Mr. Pereira's hearing, but Mr. Pereira never received it because the court did not send it to his correct address.[119] When Mr. Pereira failed to appear at his hearing, he was ordered removed *in absentia*. After being arrested for a motor vehicle violation in 2013, Mr. Pereira found out that he had been ordered removed.[120]

With the help of counsel, Mr. Pereira successfully reopened his prior court proceeding on the ground that he never received notice of the original hearing.[121] After the immigration judge rescinded the *in absentia* order, Mr. Pereira applied for a form of relief known as cancellation of removal.[122] One of the requirements to qualify for cancellation of removal is at least ten years of continuous presence in the United States.[123] Mr. Pereira argued that he satisfied this requirement because he had been in the United State since 2000,

---

115 138 S. Ct. 2105 (2018).

116 *See, e.g.*, Joel Rose, *Supreme Court Ruling Means Thousands of Deportation Cases May Be Tossed Out*, NPR (Sept. 17, 2018, 4:20 PM), https://www.npr.org/2018/09/17/648832694/supreme-court-ruling-means-thousands-of-deportation-cases-may-be-tossed-out [https://perma.cc/N38U-CBAU] (explaining that, although the Supreme Court's decision in *Pereira* did not initially receive much attention, it has since called attention to notice defects in thousands of deportation cases).

117 *Pereira*, 138 S. Ct. at 2112.

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 I.N.A. § 240A(b)(1), 8 U.S.C. § 1229b(b)(1) (2018) (providing criteria for the remedy of cancellation of removal for "certain nonpermanent residents").

while the government claimed that he could not satisfy this requirement because his "cancellation clock"—that is, the measurement of how long he had been in the United States—had stopped when he was served with the notice to appear back in 2006.[124]

The issue on appeal before the United States Supreme Court was whether service of a charging document that does not contain the time and date of the immigration court hearing can "stop time" for purposes of eligibility for cancellation of removal.[125] Section 239(a) of the Immigration and Nationality Act contains an explicit requirement that immigration cases begin with the service of an NTA, which must specify the "time and place at which the proceedings will be held."[126] However, the Board of Immigration Appeals (BIA), the administrative body that decides direct appeals from immigration court, previously concluded that the time and date of the initial hearing need not be included on the NTA to trigger the stop-time rule.[127]

The Supreme Court ruled 8-1 that the answer to the question was "obvious."[128] Writing for the Court, Justice Sotomayor explained that the "plain text, the statutory context, and common sense all lead inescapably and unambiguously to [the] conclusion" that "[a] notice that does not inform a noncitizen when and where to appear for removal proceedings" is not a "notice to appear" under the immigration law.[129] Therefore, without the time and date, such a notice cannot freeze the clock for accruing continuous presence.[130]

Although *Pereira* dealt squarely with the stop-time rule, the facts of the case call attention to the routine and troubling practice of issuing notices to appear without the time or date information. In fact, at oral argument, counsel for the government admitted that "almost 100 percent" of notices to appear issued over the past three years had omitted the date and time of the proceeding.[131]

---

124 *Pereira*, 138 S. Ct. at 2112; *see also* I.N.A. § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) ("[A]ny period of continuous residence or continuous physical presence in the United States shall be deemed to end . . . when the alien is served a notice to appear.").

125 *See Pereira*, 138 S. Ct. at 2110.

126 I.N.A. § 239(a)(1)(G)(i), 8 U.S.C. § 1229(a)(1)(G)(i); *see also* 8 C.F.R. § 239.1 (2019) (authorizing Department of Homeland Security officials to serve a respondent with a "notice to appear" in immigration court, in accordance with § 239(a) of the Immigration and Nationality Act).

127 *Pereira*, 138 S. Ct. at 2111-12 (citing Camarillo, 25 I. & N. Dec. 644, 647, 651 (2011)).

128 *Id.* at 2109-10. Justice Alito, the sole dissenting Justice, concluded that a "straightforward application of *Chevron*" required acceptance of the government's own construction of the statute, rather than one that the Court regarded as the "best reading of the statute." *Id.* at 2121 (Alito, J., dissenting).

129 *Id.* at 2110.

130 *Id.*

131 Transcript of Oral Argument at 52, Pereira v. Sessions, 138 S. Ct. 2105 (2018) (No. 17-459) (Frederick Liu, Assistant to the Solicitor General, Department of Justice, responding to Justice Anthony M. Kennedy). In practice, the Department of Homeland Security (DHS) often served charging documents with no date or time for the hearing because DHS did not learn when the hearing would be scheduled until it filed the charging document with the immigration court. Memorandum from James R. McHenry III, Dir., Exec. Office for Immigration Review, to All of

This pervasive defect in notice is part of the reason why noncitizens do not appear in court.[132] The facts of Mr. Pereira's case also underscore how clerical court errors—such as serving a notice to the wrong address—can further deprive respondents of ever learning about their hearings.[133]

To address these notice deficits, we evaluated how often immigration judges identified failures to appear occurring due to notice issues. Each time a hearing ends, the immigration court enters an "adjournment code" that describes the reason why the hearing was adjourned. One of these codes indicates that notice was sent or served incorrectly.[134] Looking at the cases of individuals who were never detained, we found that immigration judges adjourned fewer than 1% of initial hearings due to notice issues.[135] However, when judges did adjourn these missed hearings due to notice issues, we found

EOIR, Policy Memorandum 19-08: Acceptance of Notices to Appear and Use of the Interactive Scheduling System 1 (Dec. 21, 2018), http://libguides.law.ucla.edu/ld.php?content_id=46363627 [https://perma.cc/JP6L-GHRY]. This practice is beginning to change after *Pereira*. *See id.* at 1-2 ("Following the Supreme Court's decision in *Pereira v. Sessions* . . . EOIR began providing dates and times directly to DHS to use on NTAs . . . .").

132 For further discussion of practice issues in the wake of *Pereira*, see CATHOLIC LEGAL IMMIGRATION NETWORK, INC., PRACTICE ADVISORY: *PEREIRA V. SESSIONS*—UPDATED STRATEGIES AND CONSIDERATIONS (2019), https://www.aila.org/infonet/council-practice-advisory-pereira-v-sessions [https://perma.cc/RP98-LWKD]; DAN KESSELBRENNER ET AL., NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD & IMMIGRANT DEF. PROJECT, PRACTICE ADVISORY: CHALLENGING THE VALIDITY OF NOTICES TO APPEAR LACKING TIME-AND-PLACE INFORMATION 9-19 (2018), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2018_5July_PereiraAdvisory.pdf [https://perma.cc/MK84-VH2Q].

133 Litigation is ongoing over the jurisdictional validity of removal orders issued based on charging documents without time and date information. In August 2018, the BIA issued a precedential decision which limits the application of *Pereira* to the stop-time rule in requests for cancellation of removal. *See* Bermudez-Cota, 27 I. & N. Dec. 441, 442-43 (B.I.A. 2018). Specifically, the BIA found that an NTA "that does not specify the time and place of an alien's initial removal hearing vests an Immigration Judge with jurisdiction over the removal proceedings and meets the requirements of [§ 1229(a)], so long as a notice of hearing specifying this information is later sent to the alien." *Id.* at 447. Some federal courts of appeals have found, consistent with *Bermudez-Cota*, that an NTA that fails to include date and time can still vest jurisdiction with the immigration court so long as a notice of a hearing specifying this information is later sent to the respondent. *See, e.g.*, Garcia-Romo v. Barr, 940 F.3d 192, 196-97 (6th Cir. 2019); Karingithi v. Whitaker, 913 F.3d 1158, 1158-59, 1161-62 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 1106 (2020). Other courts have rejected this view, concluding that DHS may not rely on a subsequent notice of hearing to cure a defective NTA. *See, e.g.,* Banuelos-Galviz v. Barr, No. 19-9517, slip op. at 2 (10th Cir. Mar. 25, 2020); Guadalupe v. Attorney Gen. United States, No. 19-2239, slip op. at 3 (3d Cir. Feb. 26, 2020).

134 Adjournment Code Memorandum, *supra* note 101, at 3 (including Adjournment Code 10, to be used when an "[a]ttorney and/or alien does not appear at the scheduled hearing due to the notice of hearing containing inaccurate information, or, alien/attorney appears but has not received adequate notice of hearing of the proceedings").

135 Analyzing never-detained cases, we found that 11,121 out of a total of 1,285,947 initial hearings, or .86%, were adjourned due to lack of notice. This calculation measures the number of hearings that were adjourned with code 10, "Notice Sent/Served Incorrectly." *See supra* note 134. Use of adjournment code 10 in our data dates back to the 1980s.

that 54% of these respondents appeared in court at the next hearing.[136] This is an essential data point, from which we draw two important conclusions. First, although *Pereira* revealed that notice issues were prevalent during our study period, notice issues were rarely identified by immigration judges. Second, when immigration judges did pay attention to notice issues, the majority of respondents made it to court after the notice issue was addressed.

Part of the story behind the lack of attention to proper notice is the fact that immigration judges do not have decisional independence. Currently, immigration judges are part of the Department of Justice and appointed, reviewed, and disciplined by the Attorney General.[137] As immigration scholar Jill Family explains, the structure of immigration courts "provides no formal protections for these administrative decision makers."[138] Concerns have been raised that immigration adjudicators are hired based on their political loyalties,[139] and that, as a result, ruling against the government could be hazardous to their job.[140] Growing case backlogs, strict case quotas, and mandatory timelines for case completions have further amplified the pressures on immigration judges.[141] This lack of judicial independence no doubt increases pressure to enter *in absentia* orders quickly without first rigorously evaluating the merits of whether proper notice was in fact supplied to the respondent.[142]

---

136 Analyzing both completed and pending cases, we found that 5,981 out of the 11,121 hearings adjourned for lack of notice at the initial-hearing stage did not end *in absentia*, compared to 5,140 that did result in an *in absentia* order.

137 *See* Jill E. Family, *Beyond Decisional Independence: Uncovering Contributors to the Immigration Adjudication Crisis*, 59 U. KAN. L. REV. 541, 543 (2011) ("One major problem with the system is a lack of decisional independence at the administrative level. The lack of decisional independence stems from the placement of immigration judges and the Board as mere employees of the Attorney General."); Dana Leigh Marks, *An Urgent Priority: Why Congress Should Establish an Article I Immigration Court*, 13 BENDER'S IMMIGR. BULL. 3, 10-12 (2008), https://www.naij-usa.org/images/uploads/publications/Urgent-Priority_1-1-08_1.pdf [https://perma.cc/YV2F-8WWQ] (raising concerns regarding the lack of judicial independence).

138 Jill E. Family, *Murky Immigration Law and the Challenges Facing Immigration Removal and Benefits Adjudication*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 45, 51 (2011).

139 *Id.*

140 *See* Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 385-403 (2006) (arguing that judicial independence is necessary to uphold the rule of law).

141 *See, e.g.*, Memorandum from James R. McHenry III, Director, Exec. Office for Immigration Review, to Office of the Chief Immigration Judge, All Immigration Judges, All Court Administrators, and All Immigration Court Staff (Jan. 17, 2018), https://libguides.law.ucla.edu/ld.php?content_id=39231331 [https://perma.cc/C6NP-7HAV] (outlining case completion goals and performance metrics for immigration judges).

142 In an important new study, Catherine Kim and Amy Semet find that the presidential administration that is in control is a statistically significant predictor of removal rates. Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 625-27 (2020). This troubling finding increases concern that decisions of political actors within the administration may in fact influence the decisionmaking of immigration judges.

Given that so few judges adjourn hearings due to notice issues, we next evaluated what happened after the initial *in absentia* order was entered. Most immigration cases end after an initial case completion,[143] but some cases do continue on to a subsequent case completion.[144] Like an initial case completion, a subsequent case completion can end in a decision on the merits, like a removal, relief, or termination decision, or an administrative completion, such as administrative closure or transfer. In other words, an initial proceeding that ends with *in absentia* removal might be subsequently reopened and a new proceeding conducted. Importantly, the government's reporting of *in absentia* removal omits any analysis of subsequent case completions.

Under the immigration law, an *in absentia* removal order may be challenged in court and reversed if the respondent did not receive notice of the hearing or if there were other "exceptional circumstances" that caused their failure to appear.[145] Common reasons identified by immigration attorneys for failures to appear in immigration court include not receiving notice of the hearing, serious health or transportation problems, and ineffective assistance of counsel.[146] In practice, the respondent or respondent's

143 EOIR defines an "initial case" as "[t]he proceeding that begins when the Department of Homeland Security files a charging document with an immigration court and ends when an immigration judge renders a determination." EOIR 2013 YEARBOOK, *supra* note 9, Glossary of Terms at 7.

144 EOIR defines a "subsequent case" as a proceeding "that begins when: 1) the immigration judge grants a motion to reopen, reconsider, or recalendar; or 2) the Board of Immigration Appeals issues a decision to remand and ends when the immigration judge renders a determination." *Id.*, Glossary of Terms at 11. For example, according to the EOIR data published in its Statistics Yearbooks, in 2016 there were 186,434 initial case completions and 20,609 subsequent case completions. EOIR 2016 YEARBOOK, *supra* note 47, at A8.

145 I.N.A. § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) (2018). *See generally* BETH WERLIN, AM. IMMIGRATION COUNCIL, PRACTICE ADVISORY: RESCINDING AN IN ABSENTIA ORDER OF REMOVAL 7-10 (Mar. 31, 2010), https://www.americanimmigrationcouncil.org/practice_advisory/rescinding-absentia-order-removal [https://perma.cc/8TAX-UMNT] (providing legal guidance on how to establish exceptional circumstances); Rebecca Feldmann, *What Constitutes Exceptional? The Intersection of Circumstances Warranting Reopening of Removal Proceedings After Entry of an In Absentia Order of Removal and Due Process Rights of Noncitizens*, 27 WASH. U. J.L. & POL'Y 219, 224, 234-45 (2008) (arguing that "circumstances beyond a person's control, as clearly established by the totality of the circumstances" should meet the statutory "exceptional circumstances" requirement). Each immigration judge also has the authority to reopen any proceeding in which she issued a decision, upon the judge's own motion. 8 C.F.R. § 1003.23(b)(1) (2019). For an excellent overview of motions to reopen, see MICHELLE MENDEZ & REBECCA SCHOLTZ, CATHOLIC IMMIGRATION NETWORK, INC., PRACTICE ADVISORY: MOTIONS TO REOPEN FOR DACA RECIPIENTS WITH REMOVAL ORDERS 14-32 (2018), https://cliniclegal.org/resources/removal-proceedings/practice-advisory-motions-reopen-daca-recipients-removal-orders [https://perma.cc/33A9-5LJ5]. We also thank the Honorable Mimi Tsankov, Regional Vice President, National Association of Immigration Judges, for helping us to understand motions to reopen.

146 CONCHITA CRUZ ET AL., ASYLUM SEEKER ADVOCACY PROJECT & CATHOLIC LEGAL IMMIGRATION NETWORK, INC., A GUIDE TO ASSISTING ASYLUM-SEEKERS WITH *IN ABSENTIA* REMOVAL ORDERS 4 (2019), https://cliniclegal.org/resources/asylum-and-refugee-law/guide-assisting-asylum-seekers-absentia-removal-orders [https://perma.cc/JX9H-V73X].

attorney would bring a motion to reopen the proceeding, explain the reasons why the hearing was missed, and ask the judge to rescind the *in absentia* order and continue with the merits of the case.[147]

Using our Nondetained Removal Sample of EOIR data,[148] we analyzed the impact of subsequent case review on *in absentia* removal orders. Overall, as seen in Table 8, *in absentia* removal occurred in 316,089 nondetained initial case completions over the eleven years of our study. Of these, 15% (*n* = 47,952) were successfully reopened.[149]

Table 8: Reopening of *In Absentia* Removal Orders, by Fiscal Year (2008–2018) (Nondetained Only)[150]

Fiscal Year	*In Absentia* at Initial Completion	Successful Motion to Reopen	Reopened (Percent)
2008	24,882	4,716	19%
2009	22,071	4,560	21%
2010	23,852	4,651	19%
2011	21,739	4,331	20%
2012	18,990	3,464	18%
2013	20,940	3,799	18%
2014	25,587	4,188	16%
2015	37,994	5,558	15%
2016	33,896	4,589	14%
2017	41,374	4,812	12%
2018	44,764	3,284	7%
Total	316,089	47,952	15%

These results show that some cases in which a judge issued an *in absentia* order of removal were later successfully reopened. This finding is important

147 TRINA REALMUTO & KRISTIN MACLEOD-BALL, AM. IMMIGRATION COUNCIL, PRACTICE ADVISORY: THE BASICS OF MOTIONS TO REOPEN EOIR-ISSUED REMOVAL ORDERS PRACTICE ADVISORY 4-5 (2018), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory.pdf [https://perma.cc/F2X5-L2MQ].

148 *See supra* Section II.D.

149 In contrast, of the 839,380 initial case completions that did not end in an *in absentia* removal order, we found that only 0.58% (*n* = 4,865) had been ordered removed at the most recent proceeding.

150 Table 8 counts as reopened those cases in which respondents were ordered removed *in absentia* at the initial case completion, but then had a subsequently opened proceeding. "Fiscal Year" corresponds to the year of the initial case completion (not the year that the case was reopened).

because the analysis of *in absentia* relied on by the government assumes that all *in absentia* orders are entered for individuals who never come to court. On the contrary, as many as one-fifth of those removed *in absentia* in any given year did later come to court to protest the entry of the *in absentia* order.[151]

In addition, older cases have a higher rate of reopening than newer cases. For cases that received an *in absentia* order in 2008, 19% have been reopened.[152] In contrast, only 7% of *in absentia* orders entered in 2018 have been reopened.[153] This outcome makes sense, as many individuals with *in absentia* orders may not yet be aware that they were ordered removed and need time to make a motion to reopen in immigration court. Given the legal complexity of such a motion, individuals will also need time to find and retain counsel. Over time, therefore, we can expect the percentage of *in absentia* cases that are reopened to rise.[154]

Whether a case is reopened, however, rests in the hands of immigration judges. In order to grant a motion to reopen an *in absentia* removal order, a judge must find that the hearing notice was defective, the respondent was in custody at the time of the hearing,[155] or that exceptional circumstances excused the failure to appear.[156] Of the 316,089 cases where initial completion occurred through an *in absentia* removal order, 18% (n = 56,877) of those

151 *See supra* Table 8.

152 *Id.*

153 *Id.*

154 A motion to reopen based on lack of notice of the hearing can be brought at any time. *See* I.N.A. § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) (2018); 8 C.F.R. § 1003.23(b)(4)(ii) (2019) (noting that an alien can file a motion to reopen at "any time"). Of course, individuals who do not obtain counsel or otherwise learn about the motion to reopen process may never bring such a motion in court. Additionally, although cases with *in absentia* orders may be reopened, *in absentia* orders cannot be appealed. *See* Lenni B. Benson & Russell R. Wheeler, Enhancing Quality and Timeliness in Immigration Removal Adjudication 21 (June 7, 2012) (draft report), https://www.acus.gov/report/immigration-removal-adjudication-report [https://perma.cc/46PZ-KY5X] ("The BIA has held that a respondent may not appeal from an in absentia order although in some cases the individual may seek a motion to reopen.").

155 *See* I.N.A. § 240(b)(5)(C)(ii), 8 U.S.C. § 1229a(b)(5)(C)(ii) (providing for rescission of a removal order "upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice . . . or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien").

156 A respondent may later reopen the immigration case based on a showing that the failure to appear was due to exceptional circumstances. *See* I.N.A. § 240(b)(5)(C)(i), 8 U.S.C. § 1229a(b)(5)(C)(i) (stating that an *in absentia* removal order may be rescinded "upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances"); *see also* I.N.A. § 240(e)(1), 8 U.S.C. § 1229a(e)(1) (indicating that exceptional circumstances include "battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien").

respondents sought to reopen their cases by filing motions to reopen.[157] Judges granted 84% of these motions (n = 47,952). Overall, 15% of those ordered removed *in absentia* had a successful motion to reopen (n = 47,952 of 316,089).[158] This finding suggests that those who have moved to reopen by and large have meritorious grounds for reopening their cases.

Our findings about the reopening of *in absentia* orders are consistent with an influential report by Catholic Legal Immigration Network (CLINIC). Analyzing *in absentia* cases handled by their office since 2015, CLINIC found that their lawyers were able to successfully reopen 96% of these *in absentia* orders.[159] Judges were willing to reopen because CLINIC's clients had "legitimate reasons for being unable to attend their hearings, including lack of notice, incorrect government information, serious medical problems, language barriers, and severe trauma or disabilities."[160]

In conclusion, Part I relied on statistics presented in the EOIR Statistics Yearbooks to summarize how the government has presented *in absentia* removal over the past decade. We showed that the measurement of *in absentia* removal has been limited to the percentage of *in absentia* orders among immigration judge decisions and has not included other completions or pending matters in these calculations. In Part II we engaged in our own original analysis of the EOIR data to develop new methods for measuring *in absentia* removal. Overall, we found that the number of *in absentia* removal orders has increased somewhat since 2008, but this increase has been far outpaced by the addition of new cases into the immigration courts. Only 12% of all matters in the immigration courts since 2008 ended in an *in absentia* removal order.[161] Moreover, 15% of initial case completions that ended with *in absentia* removal were later successfully reopened.[162] These and other findings introduced in Part II contribute a clearer picture of how to measure *in absentia* removal.

---

157 EOIR provides data on all motions filed before the immigration courts, including "Motions to Reopen" and "Motions to Reopen for In Absentia." Of the 56,877 respondents who sought to reopen their cases, we include 191 respondents who did not have motions to reopen in the data but whose *in absentia* removal orders were clearly rescinded, as indicated by the opening of subsequent proceedings.

158 We note that of these 47,952 individuals with a successful motion to reopen, 7% (n = 3,523) were ultimately ordered removed *in absentia*.

159 DENIED A DAY IN COURT, *supra* note 27, at 6, 17.

160 *Id.* at 6.

161 *See supra* Table 6.

162 *See supra* Table 8.

III. UNDERSTANDING *IN ABSENTIA* REMOVAL

In Part III, we seek to discover additional factors associated with *in absentia* removal. As the discussion that follows reveals, we find that whether someone receives an *in absentia* order is associated with three important variables: attorney representation, applications for relief from removal, and judge assignment.

A. *Attorney Involvement*

Noncitizens have a right to be represented by counsel in immigration proceedings, but generally not at the expense of the government.[163] Following a 2010 court decision, one exception to this rule is for individuals in detention who have serious mental impairments. In such cases, counsel is appointed by the court.[164] Immigration court rules allow respondents to be represented by attorneys or, less frequently, by "accredited representatives" who are not attorneys but work for nonprofit organizations that specialize in immigration court practice.[165]

Prior to representing someone in court, attorneys must file a Notice of Entry of Appearance (EOIR-28).[166] The EOIR data allow us to determine

163 *See* I.N.A. § 240(b)(4)(A), 8 U.S.C. § 1229a(b)(4)(A) (2018) ("[T]he alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings."); Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 554 (9th Cir. 1990) ("[A]liens have a due process right to obtain counsel of their choice at their own expense.").

164 *See* Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034, 1051-58 (C.D. Cal. 2010) (finding that plaintiffs' mental conditions and the importance of the issues in their cases mandated accommodation under the Rehabilitation Act in the form of providing "Qualified Representatives" for "the entirety of their immigration proceedings"). After the district court decision in *Franco-Gonzalez*, the United States agreed to a nationwide policy to appoint counsel for immigrants with serious mental disabilities. *See* Press Release, Exec. Office for Immigration Review, U.S. Dep't of Justice, Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), http://www.justice.gov/eoir/pages/attachments/2015/04/21/safeguards-unrepresented-immigration-detainees.pdf [http://perma.cc/HR36-3HET] ("EOIR will make available a qualified representative to unrepresented detainees who are deemed mentally incompetent to represent themselves in immigration proceedings.").

165 *See* 8 C.F.R. § 292.2(a) (2019) (providing criteria under which qualifying organizations may designate non-attorney representatives to practice before an immigration judge or immigration law enforcement agency); *see also* 8 C.F.R. § 292.1(a)(4) (designating these non-attorney representatives "accredited representatives" and authorizing their practice). For a thoughtful discussion of the options available to expand access to legal representation in immigration court, see Donald Kerwin, *Revisiting the Need for Appointed Counsel*, MPI INSIGHT (Migration Policy Inst., Washington, D.C.), Apr. 2005, at 1, 12-16, https://www.migrationpolicy.org/research/revisiting-need-appointed-counsel [https://perma.cc/F2CY-RH5V].

166 *See* Exec. Office for Immigration Review, U.S. Dep't of Justice, Form EOIR-28, Notice of Entry of Appearance as Attorney or Representative Before the Immigration Court (rev. Dec. 2015), http://www.justice.gov/eoir/eoirforms/eoir28.pdf [https://perma.cc/D7UN-7BHS] [hereinafter

whether a respondent had counsel because they report whether an EOIR-28 form was filed with the immigration court.[167] If the required form was filed with the court prior to or by the conclusion of the relevant proceeding, we counted the respondent as represented.[168] We also counted respondents with late-filed EOIR-28 forms as represented if court records showed that an attorney appeared in an immigration court hearing during the relevant proceeding.

To evaluate the relationship between representation and *in absentia* orders, we examined the rate of *in absentia* removals among those who had counsel over the eleven-year study period. As seen in Figure 3, individuals with counsel rarely received *in absentia* removal orders. Among nondetained represented respondents who reached an initial immigration judge's merits decision, only 8% were ordered removed *in absentia*.[169] Among all nondetained cases that reached an immigration judge completion, only 6% with counsel ended with *in absentia* removal.[170] Finally, if all nondetained matters are considered, the *in absentia* rate for represented respondents was only 4%.[171]

EOIR-28 Form]; *see also* 8 C.F.R. § 1003.17(a) ("In any proceeding before an Immigration Judge in which the alien is represented, the attorney or representative shall file a Notice of Entry of Appearance on Form EOIR-28 with the Immigration Court.").

167 Our replication of calculations published in the EOIR's annual reports reveals that the filing of the EOIR-28 form is also relied upon by EOIR in its statistical analysis of representation by counsel in immigration court.

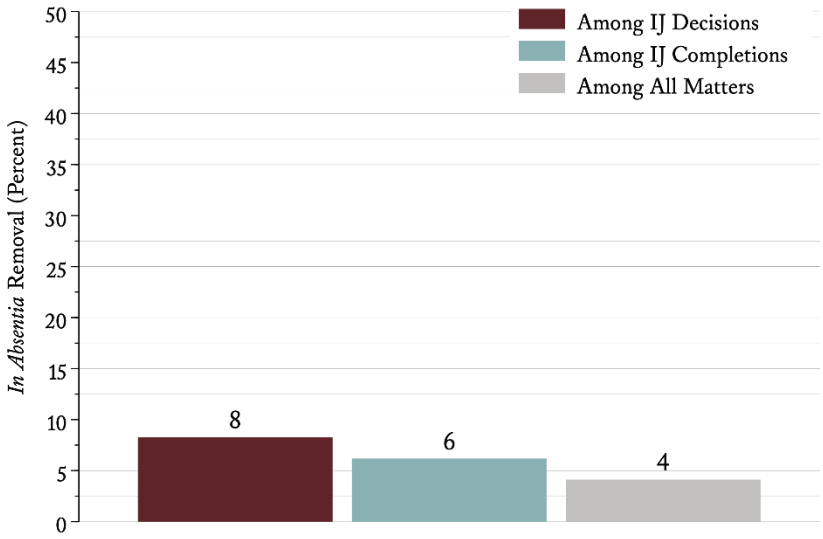
168 In December 2015, the EOIR-28 form was revised to allow for an attorney to represent the respondent in the bond proceedings without taking on the merits of the case. *See* EOIR-28 Form, *supra* note 166; *see also* 8 C.F.R. § 1003.17(a) ("The entry of appearance of an attorney or representative in a custody or bond proceeding . . . shall be separate and apart from . . . appearance in any other proceeding before the Immigration Court. . . . [A] representative may file an EOIR-28 indicating whether the entry of appearance is for custody or bond proceedings only, any other proceedings only, or for all proceedings."). For purposes of our analysis, we only measure whether an EOIR-28 form was filed as part of the merits portion of the case.

169 Out of all the immigration judge initial merits decisions issued in cases involving nondetained respondents during our study period (n = 930,271), 62% (n = 574,199) had counsel.

170 Out of all the nondetained immigration judge initial case completions (both merits and other completions) issued during our study period (n = 1,155,469), 66% (n = 766,576) had counsel.

171 Out of all the nondetained immigration judge initial case completions and pending cases occurring during our study period (n = 1,829,049), 63% (n = 1,148,544) had counsel.

Figure 3: *In Absentia* Removal Rate Among Respondents with Counsel, by Calculation Method (2008–2018) (Nondetained Only)[172]



We also find that most cases in which judges entered *in absentia* orders involved unrepresented litigants. Overall, only 15% of those who were ordered removed *in absentia* during our study period had an attorney.[173] By contrast, 86% of those who avoided an *in absentia* order had counsel.[174]

Similar patterns were associated with the reopening of *in absentia* orders. As discussed in Part II, 15% of nondetained *in absentia* orders entered over the past eleven years have been reopened.[175] We find that the ability to reopen is mainly reserved for those who find counsel. That is, among those who were able to successfully reopen their case after an *in absentia* removal order, 84% had a lawyer representing them.[176]

---

172 Figure 3 measures the percent of represented respondents that were ordered removed *in absentia* from 2008 to 2018.

173 Of the 316,089 *in absentia* orders issued in removal proceedings at the initial case completion over the eleven-year period of our study, only 47,350 were represented by counsel.

174 Of the 839,380 immigration judge initial completions not issued *in absentia* in removal proceedings over the eleven-year period of our study, 719,226 were represented by counsel. The Catholic Legal Immigration Network (CLINIC) has also found, based on data released by EOIR, that individuals without attorneys are at higher risk of being removed *in absentia*. *See FOIA Disclosures on In Absentia Removal Numbers Based on Legal Representation*, CLINIC LEGAL (Mar. 27, 2020), https://cliniclegal.org/resources/freedom-information-act/foia-disclosures-absentia-removal-numbers-based-legal [https://perma.cc/47CD-C3J5].

175 *See supra* Table 8.

176 Of the 47,952 respondents who successfully reopened their cases after an initial *in absentia* order, 40,303 were represented by counsel at their most recent proceeding.

As these striking statistics suggest, attorneys play a vital supporting role in ensuring that their clients make it to court.[177] Without a lawyer, some respondents attend their check-in appointments with ICE believing erroneously that it is their court date and then miss their actual court date.[178] Other respondents have reported missing their hearings after being given NTAs with no court date or with a fake court date at an erroneous location.[179] Unrepresented respondents may also encounter challenges in completing the necessary court documents to reschedule an immigration court hearing or to notify the court about a change of address.[180] For example, despite policy to the contrary,[181] immigration courts do not always accept notifications of changes of address before proceedings have formally begun, leaving respondents unable to receive notice of their hearings at their current address.[182]

Attorneys receive written notice of hearing dates and times and therefore can notify their clients about when their hearing is scheduled and where the court is located.[183] Attorneys can also help their clients who do not speak English by interpreting forms and notices into their clients' primary

177 Recognizing the crucial role that attorneys play, Stephen Manning and Juliet Stumpf argue in favor of a large scale and collaborative representation model—"big immigration law"—in which teams of volunteer attorneys focus on specific legal issues and geographic areas to increase representation rates and ensure access to justice. Stephen Manning & Juliet Stumpf, *Big Immigration Law*, 52 U.C. DAVIS L. REV. 407, 420-32 (2018).

178 Respondents awaiting immigration court hearings are often told to report periodically to a deportation officer. We thank New York-based immigration attorney Jeffrey Chase for this example.

179 *See, e.g.*, Tatiana Sanchez, *Confusion Erupts as Dozens Show Up for Fake Court Date at SF Immigration Court*, S.F. CHRON. (Jan. 31, 2019), https://www.sfchronicle.com/bayarea/article/Confusion-erupts-as-dozens-show-up-for-fake-13579045.php [https://perma.cc/BHJ2-CQ3X] (reporting that some attorneys contend that ICE is sending notices to appear "with court dates it knows are not real").

180 *See* DENIED A DAY IN COURT, *supra* note 27, at 15 (discussing some of the challenges that pro se respondents encounter in filing motions and changing their address with the immigration court).

181 Memorandum from Mark Pasierb, Chief Clerk of Immigration Court, to All Immigration Judges, All Court Administrators, All Attorney Advisors and Judicial Law Clerks, and All Immigration Court Staff 6 (June 17, 2008), https://libguides.law.ucla.edu/ld.php?content_id=52153727 [https://perma.cc/3CUT-QHWZ] ("EOIR-33/ICs are accepted even if no Notice to Appear has been filed.").

182 *See, e.g.*, AILA-EOIR Liaison Meeting Agenda Questions and Answers 3 (Oct. 21, 2008), https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/29/eoiraila102108.pdf [https://perma.cc/D8SK-8NEL] (reporting rejections of changes of address forms in cases where the notice to appear had not yet been filed with the court).

183 The EOIR's mandatory electronic registry for attorneys and accredited representatives provides notice directly to counsel. *See* Registry for Attorneys and Representatives, 78 Fed. Reg. 28,124, 28,124 (May 13, 2013) ("The eRegistry will individually and uniquely identify each registered attorney or accredited representative and associate the information provided during registration with that attorney or accredited representative. This will increase efficiency by reducing system errors in scheduling matters and providing improved notice to attorneys and accredited representatives.").

language.[184] When court dates change or judges are reassigned, attorneys can explain these essential changes to their clients. If a hearing is scheduled at a time or location that is not feasible for a respondent to attend, attorneys can file a motion with the court to change the venue or time and date of the hearing. Without this assistance, respondents can get confused about where and when to report to court.[185]

In highlighting the association between counsel and court appearance, we acknowledge that attorneys may select cases of individuals who have stronger claims and thus are more highly motivated to attend their court hearings.[186] Similarly, individuals who seek out and hire attorneys may be less likely to miss a court appearance because they have invested in the process. Furthermore, in demonstrating the value of effective counsel, we do not mean to suggest that attorneys always help their clients to attend court. As Chief Judge Robert A. Katzmann of the Second Circuit Court of Appeals has noted, unskilled and unscrupulous immigration attorneys have been known to fail to notify their clients of the hearing dates they were required to attend.[187] In these unfortunate circumstances, relying on a lawyer to navigate the court process could actually lead to missing the court hearing.

The immigration court does provide an 800 number to call for information about future court dates,[188] but many respondents may be unaware of this service. In addition, this toll-free line only provides access to a recording and requires that the caller have the respondent's eight or nine digit case identification number to receive information.[189] The EOIR hotline

184 As Jennifer Koh has noted, *in absentia* orders also raise important issues about quality of counsel. Not all attorneys provide quality representation and in some cases fail to properly notify their clients about upcoming hearings or miss court themselves. *See* Koh, *supra* note 24, at 225 (explaining that *in absentia* orders "raise unique access to counsel issues that require an acknowledgment of how the quality of counsel matters").

185 *See, e.g.,* Julia Preston, *Fearful of Court, Asylum Seekers Are Banished in Absentia*, MARSHALL PROJECT (July 30, 2017, 8:52 PM), https://www.themarshallproject.org/2017/07/30/fearful-of-court-asylum-seekers-are-deported-in-absentia [https://perma.cc/AYM3-L7CH] (featuring a case of an unrepresented individual who was almost ordered removed *in absentia* when he mistakenly went to a city courthouse in Charleston, South Carolina instead of the immigration court in Charlotte, North Carolina).

186 *See* Eagly & Shafer, *supra* note 51, at 48 (discussing selection bias issues in representation in immigration court).

187 Robert A. Katzmann, *Study Group on Immigrant Representation: The First Decade*, 87 FORDHAM L. REV. 485, 488 (2018); *see also* DENIED A DAY IN COURT, *supra* note 27, at 25-26 (featuring examples of individuals who missed their hearing because their attorney failed to notify them of the court date).

188 *See Customer Service Initiatives*, EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/customer-service-initiatives [https://perma.cc/FQ72-ND4P] (updated Mar. 20, 2018) (explaining that by calling the 800 number, a "customer[]" can obtain information including the "[n]ext hearing date, time, and location").

189 *See id.* (explaining how the "automated immigration court information system" functions and explaining that "[t]o access case information, callers must use the alien registration number, which begins with the letter A and is followed by an 8- or 9-digit number"). Using the toll-free line

is also only available in English and Spanish,[190] making it inaccessible to individuals who do not speak these languages.

Our findings on the strong association between counsel and court appearance rates build on an earlier study by the Vera Institute for Justice on the Legal Orientation Programs (LOP), a program that provides know-your-rights sessions and intensive pro se training sessions for individuals in detention.[191] The Vera Institute's study found that LOP participants who received know-your-rights services, as compared to those who did not, had a 7% lower rate of *in absentia* removal after release.[192]

Vera's findings are consistent with studies of other court systems indicating that individuals with access to information about the court process are more likely to come to court.[193] For example, a program in Jefferson County, Colorado called unrepresented misdemeanants and traffic offenders to remind them about their misdemeanor and traffic offense hearings.[194] The

is so complicated that nonprofit organizations have created materials describing how to call the line to obtain information about your court date. *See, e.g.*, *Cómo Chequear el Status de su Caso*, ASYLUM SEEKER ADVOCACY PROJECT, https://asylumadvocacy.org/wp-content/uploads/2019/02/Checking-Your-Status-with-Copyright.png [https://perma.cc/P4SD-75YP] (providing Spanish-language instructions for accessing commonly sought information through the automated toll-free system). If there is an *in absentia* order, pressing "1" will tell the caller that there is no hearing scheduled. They must know to press "3" in order to learn about an *in absentia* order. *See id.*

190 *Customer Service Initiatives*, *supra* note 188.

191 *See* SIULC ET AL., *supra* note 75, at iii-iv, 7-9 (explaining that the LOP, originally funded in 2002 through a $1 million congressional appropriation to DOJ, "refer[s] cases to volunteer attorneys and conduct[s] individual and group orientations on immigration law and procedure . . . for detained persons in removal proceedings").

192 *Id.* at 56-57.

193 *See* PRETRIAL JUSTICE CTR. FOR COURTS, PRETRIAL JUSTICE BRIEF 10, USE OF COURT DATE REMINDER NOTICES TO IMPROVE COURT APPEARANCE RATES 1-4 (2017), https://www.ncsc.org/~/media/Microsites/Files/PJCC/PJCC%20Brief%2010%20Sept%202017%20Court%20Date%20Notification%20Systems.ashx [https://perma.cc/38SW-Y8MF] (explaining that "notification systems may help to improve the court appearance rates of defendants, thereby reducing the community and court costs associated with missed hearings," and summarizing the effects of four approaches to court date notification systems on failure-to-appear rates); David I. Rosenbaum et al., *Court Date Reminder Postcards: A Benefit-Cost Analysis of Using Reminder Cards to Reduce Failure to Appear Rates*, 95 JUDICATURE 177, 178-80 (2012) (evaluating the results of the Nebraska Postcard Reminder Project which reduced failure-to-appear rates at misdemeanor hearings by almost 25%). Related research has suggested that individuals who are given notice of other court obligations, such as the requirement of paying a fine, are more likely to do so if enhanced notice is given. *See, e.g.*, BETH A. COLGAN, ADDRESSING MODERN DEBTORS' PRISONS WITH GRADUATED ECONOMIC SANCTIONS THAT DEPEND ON ABILITY TO PAY 19-20, HAMILTON PROJECT (Mar. 2019), https://www.brookings.edu/wp-content/uploads/2019/03/Colgan_PP_201903014.pdf [https://perma.cc/G93J-TVWZ] (stating that supportive collection practices such as the "issuance of notices prior to payment due dates, similar to those used to remind people of due dates for utilities, credit cards, and the like, are also helpful" in improving collections).

194 Timothy R. Schnacke, Michael R. Jones & Dorian M. Wilderman, *Increasing Court-Appearance Rates and Other Benefits of Live-Caller Telephone Court-Date Reminders: The Jefferson County,*

program reduced the failure-to-appear rate from 21% to only 12%.[195] Results were even better when the caller spoke personally with the defendant (rather than just leaving a message): the failure-to-appear rate for these individuals dipped to only 8%.[196] A reminder program implemented in the misdemeanor court in Coconino County, Arizona had similar success.[197] The failure-to-appear rate for those who were called in the reminder program was only 12.9%, compared to 25.4% in the control group.[198] For those who were personally contacted on the phone, the rate was the lowest: only 5.9% failed to appear.[199]

These and other studies underscore that many people miss court simply because they are not notified about their hearing, do not recognize the importance of attending, do not know where to go, or simply forget about their court date. Language barriers and unfamiliarity with the court process and notice procedures compound these difficulties. As we discuss further in the Conclusion, EOIR could improve appearance rates by addressing these notice issues.

B. *Applications for Relief*

Immigration removal proceedings are best understood as occurring in two stages.[200] In the first stage, the immigration judge decides whether to sustain the charge of removability alleged by the United States Department of Homeland Security (DHS) in the NTA.[201] If the charge is sustained and the respondent is found to be subject to removal, the respondent can seek relief from removal in the second stage.[202] There are numerous forms of relief in immigration court. The most commonly sought are asylum,[203] cancellation of

---

Colorado, FTA Pilot Project and Resulting Court Date Notification Program, 48 CT. REV.: J. AM. JUDGES ASS'N 86, 88-89 (2012).

195 *Id.* at 89.

196 *Id.*

197 WENDY F. WHITE, CRIMINAL JUSTICE COORDINATING COUNCIL & FLAGSTAFF JUSTICE COURT, COURT HEARING CALL NOTIFICATION PROJECT 3 (2006), https://community.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=34fdeae8-c04e-a57d-9cca-e5a8d4460252 [https://perma.cc/UHR7-BWNT].

198 *Id.* at 4.

199 *Id.*

200 Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 NW. U. L. REV. 933, 957-58 & fig.5 (2015).

201 *Id.* at 957; *see also* Am. Immigration Council & Penn State Dickinson Sch. of Law, Practice Advisory: Notices to Appear: Legal Challenges and Strategies 7-16, American Immigration Council & Penn State (Feb. 27, 2019), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/notices_to_appear_practice_advisory.pdf [https://perma.cc/VAV9-X7VY] (summarizing the government's burden in establishing inadmissibility or deportability and providing strategies for requesting administrative closure or termination).

202 Eagly, *supra* note 200, at 957.

203 Asylum is a form of discretionary relief available to individuals who qualify as refugees by demonstrating past persecution or a "well-founded fear of persecution" based on the noncitizen's race, religion, nationality, political opinion, and/or membership in a particular social group. I.N.A.

removal,[204] and adjustment of status.[205] To qualify for relief, a respondent must satisfy the applicable statutory eligibility requirements and convince the judge that the case merits the favorable exercise of discretion.[206] A respondent who wins relief will be able to remain lawfully in the United States.

Across the eleven years of our study period, 48% (n = 549,053 of 1,155,469) of nondetained (released or never detained) individuals in removal proceedings sought some form of relief prior to the initial completion in their cases.[207] Among these individuals who sought relief, 72% had an asylum application (n = 392,788);[208] 28% applied for cancellation of removal for lawful permanent residents or non-lawful permanent residents (n = 151,561); and 10% applied for adjustment of status (n = 45,356).

Using the all-matters method, we find that nondetained respondents applying for relief had very high appearance rates. Overall, 95% of all litigants with completed or pending applications for relief came to all of their court hearings between 2008 and 2018.[209] This result makes sense: individuals pursuing claims for relief in court have a strong incentive to come to court so that they can win permission to remain in the United States.[210]

---

§ 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (2018); I.N.A. § 208(b)(1)(A), 8 U.S.C. § 1158(b)(1)(A). Applicants for asylum may also be considered for relief under withholding of removal and protection under the Convention Against Torture by satisfying a more stringent standard. *See* I.N.A. § 241(b)(3), 8 U.S.C. § 1231(b)(3) (providing statutory requirements for demonstrating eligibility for withholding of removal); THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 882-93 (8th ed. 2016) (discussing the availability of relief under the United Nations Convention Against Torture).

204 Cancellation of removal is a form of relief available to both lawful permanent residents and undocumented individuals who have lived for a minimum number of years in the United States and who satisfy certain requirements. I.N.A. § 240A(a)-(b), 8 U.S.C. § 1229b(a)-(b).

205 Adjustment of status is a form of relief from removal available to any noncitizen who is determined eligible for lawful permanent resident status based on a visa petition approved by the United States Citizenship and Immigration Services. I.N.A. § 245, 8 U.S.C. § 1255.

206 ALEINIKOFF ET AL., *supra* note 203, at 725-26.

207 Respondents may apply for multiple forms of relief with the immigration court. We did not consider applications for voluntary departure to be a form of relief. *See supra* note 97.

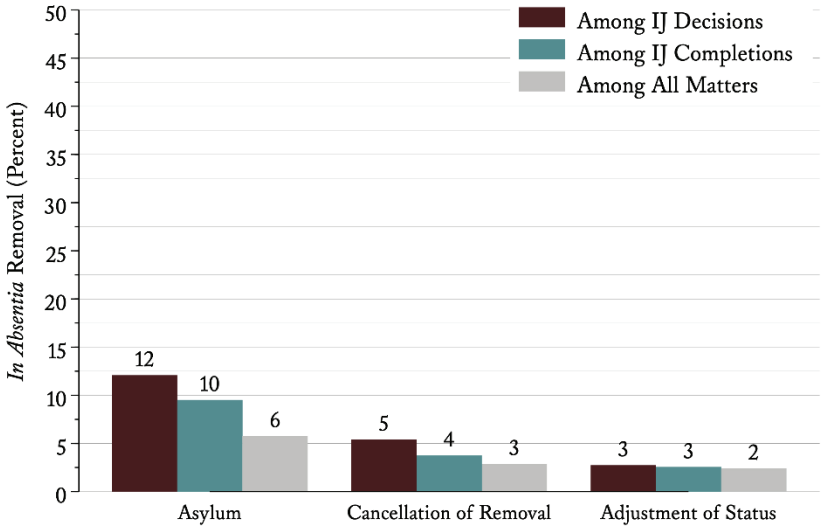
208 EOIR Form I-589 includes an application for asylum and withholding of removal, and also offers the opportunity for an application of withholding of removal under the Convention Against Torture. *See* U.S. Customs & Immigration Servs., Dep't of Homeland Security & Exec. Office for Immigration Review, U.S. Dep't of Justice, Form I-589, Application for Asylum and for Withholding of Removal (rev. Sept. 30, 2019), https://www.uscis.gov/i-589 [https://perma.cc/6MJU-W5NY] (listing the information that an applicant is required to provide to apply for asylum and withholding of removal). By "asylum application," we refer to an application for all three forms of relief.

209 During the study period, there were 829,083 completed and pending cases with applications for relief on file (n = 549,053 initial completions with such applications, and n = 431,752 initial immigration judge decisions with filed applications). Of these individuals, only 43,250 had an *in absentia* removal order, leading to *in absentia* rates of 5% for all matters, 8% for initial case completions, and 10% for immigration judge decisions.

210 *See* Oren Root, Nat'l Dir., Appearance Assistance Program, Vera Inst. of Justice, The Appearance Assistance Program: An Alternative to Detention for Noncitizens in U.S. Immigration

Figure 4 presents the *in absentia* rates for nondetained respondents who sought relief in immigration court, organized by the most common types of relief (asylum, cancellation of removal, and adjustment of status). We present these findings using all three possible measurements for *in absentia* removal: as percentages of all immigration judge decisions on the merits, all initial case completions, and all matters.

Figure 4: *In Absentia* Removal Rate, by Application Type and Calculation Method (2008–2018) (Nondetained Only)[211]



The *in absentia* rate for all matters is a particularly valuable metric for respondents seeking relief. Litigating eligibility for relief in immigration court can take years and involves multiple court hearings that require respondents to come to court. In a previous study, we found that cases in which respondents applied for relief had an average of just over seven hearings before the case was resolved.[212] Over the eleven-year period of our study, we find that only 6% of all matters involving asylum applications ended with an *in absentia* order. For those seeking cancellation of removal, the *in*

Removal Proceedings 2 (Apr. 2000), https://www.vera.org/publications/appearance-assistance-program-alternative-to-detention [https://perma.cc/65A6-TQ38] (arguing that individuals with claims for relief are "good candidates for supervised release, as they have an incentive to appear at their hearings").

211 Figure 4 calculates the proportion of individuals ordered removed *in absentia* with any of the various forms of application for relief on file. Note that individuals may apply for more than one form of relief.

212 Analyzing removal cases decided between 2007 and 2012, we found that respondents with counsel had a mean of 7.7 hearings, while those without counsel had a mean of 7.1 hearings. Eagly & Shafer, *supra* note 51, at 65 tbl.6.

absentia rate was even lower: only 3% of all matters seeking cancellation were associated with a failure to appear. Finally, among all matters in which the respondent sought adjustment of status the *in absentia* rate was only 2%.[213]

These findings are noteworthy because they reveal that immigrants seeking relief are highly likely to come to court. Such statistics have not traditionally been part of the EOIR Yearbooks, which provides only overall rates, not ones organized by application type.[214]

C. *Judicial and Jurisdictional Variation*

We next explore whether the rate of *in absentia* removal varies by court location or by judge. Currently, there are sixty different cities in the United States that host immigration courts,[215] and approximately 400 immigration judges appointed by the Attorney General of the United States.[216] In previous work, we have found that courts in different geographic locations are associated with very different patterns in how they decide cases.[217] Other important research on immigration courts has found large variation in how immigration judges decide their cases. In a trailblazing study that sounded an alarm on this issue, Jaya Ramji-Nogales, Andrew Schoenholtz, and Philip Schrag found that immigration judges varied so widely in their decisionmaking on asylum cases that the court system could best be understood as a game of chance: "refugee roulette."[218] More recent research on asylum decisions has found that the local political context of the immigration court is also associated with different case outcomes. For example, immigration judges were less likely to

---

213 Among those seeking relief who also had attorneys, the *in absentia* rate for all matters was even lower: 2.9% for those seeking asylum, 1.9% for those seeking cancellation of removal, and 1.7% for those seeking adjustment of status. These measurements are not displayed in Figure 4.

214 *See supra* Part I (summarizing data presented in the EOIR Yearbooks). In 2018, EOIR began to occasionally report in press releases and other documents statistics on *in absentia* rate among those seeking asylum. *See, e.g.*, Press Release, U.S. Dep't of Justice, Executive Office for Immigration Review Releases Court Statistics, Announces Transparency Initiative (May 9, 2018), https://www.justice.gov/opa/pr/executive-office-immigration-review-releases-court-statistics-announces-transparency [https://perma.cc/T3EA-3JAK].

215 *EOIR Immigration Court Listing*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/eoir-immigration-court-listing [https://perma.cc/TWM6-7Y5E] (last visited Jan. 10, 2020).

216 *Office of the Chief Immigration Judge*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/office-of-the-chief-immigration-judge [https://perma.cc/GWA9-P86E] (last visited Jan. 10, 2020).

217 *See* Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 848-52 (2018).

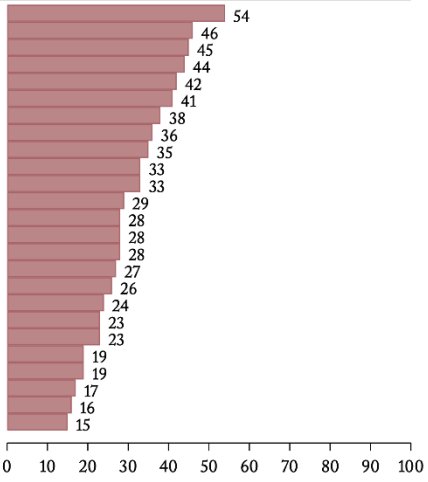
218 Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 327-49, 378 (2007). Early research by the Transactional Records Access Clearinghouse also identified disparities among immigration judges, even when isolating their analysis to the affirmative asylum petitions of nondetained Chinese nationals in the New York City area who were represented by counsel. *Immigration Judges*, TRAC IMMIGRATION (July 31, 2006), http://trac.syr.edu/immigration/reports/160 [https://perma.cc/RW26-GSL7].

grant asylum if they sat in courts where the local economy was poor or in counties that voted Republican in the last two presidential elections.[219]

Here, we are interested in the rate at which different courts, and judges within those courts, ordered *in absentia* removal. To analyze this question, we looked at the twenty-five court locations with the greatest number of nondetained initial case completions across the study period.[220] For each of these top twenty-five court locations, we then calculated the *in absentia* rate as a percentage of that court's initial case completions.[221] The results of our analysis are displayed in Figure 5.

Figure 5: *In Absentia* Removal as a Percentage of Initial Case Completions, by Court Location (2008–2018) (Nondetained Only)[222]

Base City	Initial Comp. (N)	Never Detained (%)	Active IJs (N)	*In Absentia* Removal (%)
Harlingen, TX	16,535	20	8	54
Houston, TX	46,691	56	17	46
New Orleans, LA	17,633	53	12	45
Charlotte, NC	36,619	78	4	44
San Antonio, TX	26,444	19	16	42
Dallas, TX	34,193	69	9	41
Chicago, IL	41,253	60	13	38
Memphis, TN	26,225	75	7	36
Atlanta, GA	37,845	66	10	35
Arlington, VA	41,022	67	15	33
Baltimore, MD	33,407	76	9	33
Orlando, FL	39,334	79	9	29
Philadelphia, PA	20,015	73	8	28
Kansas City, MO	17,862	57	13	28
Cleveland, OH	14,423	60	11	28
Newark, NJ	30,641	65	18	27
Miami, FL	85,383	77	37	26
Boston, MA	33,517	73	12	24
Denver, CO	18,722	57	10	23
Los Angeles, CA	135,393	74	54	23
Seattle, WA	22,113	61	5	19
San Francisco, CA	59,257	68	31	19
San Diego, CA	18,583	50	10	17
Phoenix, AZ	25,140	42	5	16
New York, NY	149,444	76	48	15



219 Daniel E. Chand, William D. Schreckhise & Marianne L. Bowers, *The Dynamics of State and Local Contexts and Immigration Asylum Hearing Decisions*, 2017 J. PUB. ADMIN. RES. & THEORY 182, 189-92 (2017); *see also* Kim & Semet, *supra* note 142, at 614-15, 618 tbl.1, 618 n.210 (explaining that immigration judges "may be influenced by the broader political and economic environment of the base city in which they sit").

220 We focus here on the twenty-five jurisdictions with the greatest number of nondetained initial case completions across our study period, accounting for almost nine out of ten of these completions (n = 1,027,694 of 1,155,469).

221 Like EOIR, we define initial case completions as including both initial immigration judge decisions and other completions, which include administrative closures. *See, e.g.*, EOIR 2016 YEARBOOK, *supra* note 47, at B2.

222 Figure 5 provides descriptive statistics for the twenty-five jurisdictions from our Nondetained Removal Sample with the greatest number of initial case completions. Figure 5 includes the total number of initial case completions, the proportion of never-detained cases, the number of active immigration judges (that is, those with one hundred or more initial case completions annually), and the percentage of initial case completions that ended with *in absentia* removal.

The variation in *in absentia* rates by city is striking. As seen in Figure 5, *in absentia* rates ranged from a high of 54% in Harlingen, Texas to a low of 15% in New York City. The three courts that handled the highest numbers of nondetained cases during our study—San Francisco, Los Angeles, and New York—also had among the lowest *in absentia* rates.

Some of these differences across jurisdictions no doubt reflect different migrant populations at these court locations. In column 3 of Figure 5 we calculate by jurisdiction the percentage of nondetained initial case completions that involved respondents who were never detained (as opposed to being released from detention). In Harlingen, Texas, for example, only 20% of initial case completions were for never-detained respondents; the remaining 80% were for individuals who were released from detention. Interestingly, however, there was still wide variation in *in absentia* removal rates across cities with similar proportions of never-detained cases. For example, approximately two thirds of the dockets in both San Francisco and Dallas were composed of cases of individuals who were never detained, but the *in absentia* rate in San Francisco was 19%, compared to 41% in Dallas.

At least some of this deviation in appearance rates reflects differences in local court practices. For example, some local courts may have better and more timely systems in place for scheduling court hearings and notifying respondents about their upcoming court hearings. A 2017 DOJ on-site review of the immigration court in Baltimore, Maryland, found that the court was so understaffed as caseloads grew that administrators were unable to enter change-of-address paperwork sent to the court into their computer system.[223] This problem means that respondents would not receive their court notices, which the report warned "can result in respondents being ordered removed *in absentia* through no fault of their own."[224] As our data reveal, 33% of respondents in the Baltimore court were removed in *absentia*.[225]

Another court practice that is associated with whether respondents came to court is the length of delay between the issuance of the NTA and the initial court date. Looking only at never-detained initial case completions,[226] we found that the average time between the filing of the NTA and the initial

223 Ani Ucar, *Leaked Report Shows the Utter Dysfunction of Baltimore's Immigration Court*, VICE NEWS (Oct. 3, 2018, 1:13 PM), https://news.vice.com/en_us/article/xw94ea/leaked-report-shows-the-utter-dysfunction-of-baltimores-immigration-court [https://perma.cc/K6J6-DGWT].

224 *Id.* (internal quotation marks omitted).

225 *See supra* Figure 5.

226 To address the potential relationship between delays in court scheduling and *in absentia* removal, we narrowed our analysis from all initial case completions to only never-detained initial case completions with no prior change of venue or transfer (n = 745,031 of 1,155,469). Of the remaining 745,031 initial case completions, we excluded 4,678 cases (less than 1%) with missing or erroneous NTAs. Finally, to focus on more active cases, we narrowed the analysis further, excluding the 3% of remaining cases (n = 21,638) with NTAs dated prior to 2006.

hearing was 239 days (*SD* = 251) for cases that ended *in absentia*. By comparison, on average there were only 167 days (*SD* = 197) between the filing of the NTA and the first hearing in never-detained cases that did not end *in absentia*. The median number of days showed similar patterns: 153 days median for cases ending *in absentia*, compared to 101 days median for cases not ending *in absentia*. This finding suggests that, on average, long delays can make it harder for people to receive proper notice, remember their court hearings, and remain in contact with the court.

The availability of counsel in different jurisdictions is an additional contributing factor to variation in failures to appear. In previous work, we found that some cities have very few practicing immigration attorneys. These problems were most acute in smaller cities where detained courts tend to be located. For example, we found that Lumpkin, Georgia, did not have a single practicing immigration lawyer, and Oakdale, Louisiana, had only four.[227] As a result, the rate of attorney representation also varies dramatically between immigration courts.[228]

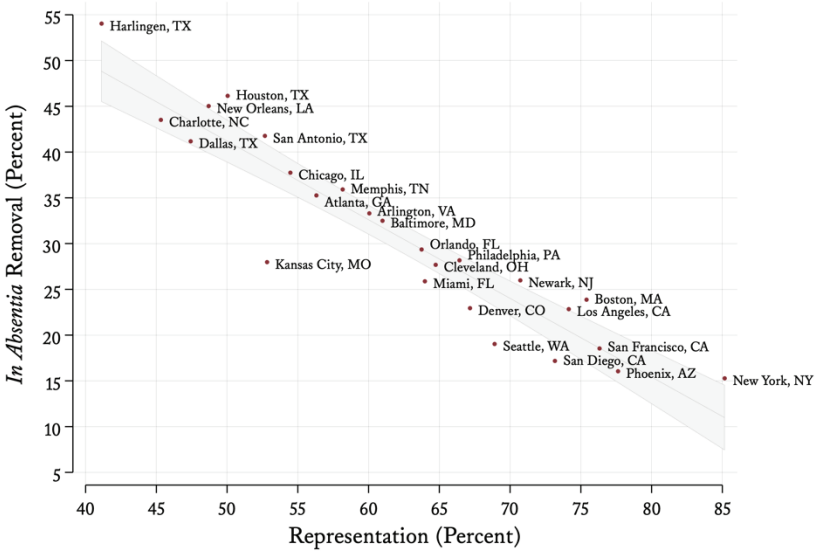
Figure 6 displays the relationship between the *in absentia* removal rates and access to counsel in these twenty-five court locations. Notably, those cities with the highest *in absentia* rates also had the lowest representation rates. For example, as seen in the upper-left corner of Figure 6, in Harlingen, Texas, where 54% of nondetained respondents were ordered removed *in absentia*, only 41% of nondetained respondents had counsel. In sharp contrast, as seen in the lower-right corner of Figure 6, 85% of nondetained respondents in New York City's immigration court had counsel,[229] and only 15% were removed *in absentia*.

227 Eagly & Shafer, *supra* note 51, at 42.

228 *See id.* at 40 ("In the busiest twenty nondetained court jurisdictions, representation rates reached as high as 87% in New York City and 78% in San Francisco. At the low end of these twenty high-volume nondetained jurisdictions, only 47% of immigrants in Atlanta and Kansas City secured representation.").

229 This high representation rate reflects the 2014 establishment of a project known as the New York Immigrant Family Unity Project, which provides free legal representation to any individual in New York's immigration court who is unable to afford counsel. *New York Immigrant Family Unity Project*, BRONX DEFENDERS, https://www.bronxdefenders.org/programs/new-york-immigrant-family-unity-project [https://perma.cc/DZ26-62X3] (last visited Jan. 10, 2020).

Figure 6: Relationship Between *In Absentia* Removal Rate and Representation by Counsel, by Base City (2008–2018) (Nondetained Only)[230]



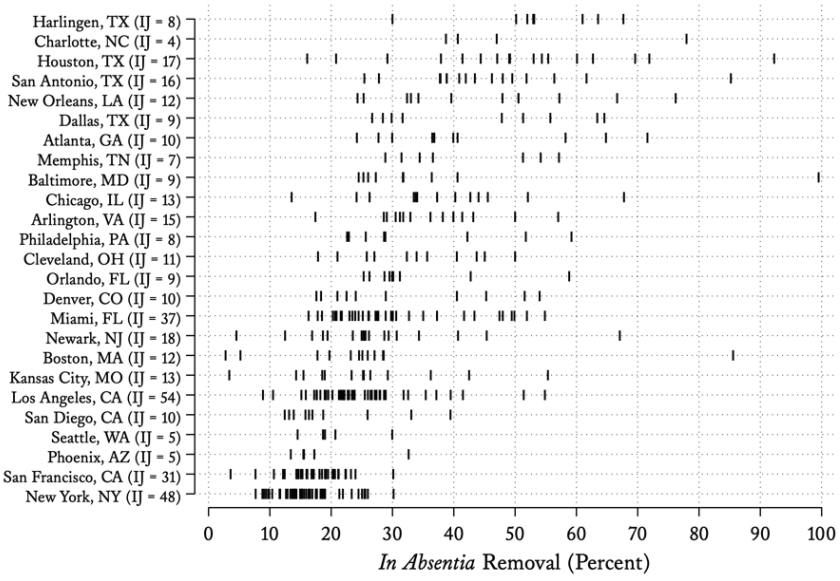
Variation across immigration courts could also reflect differences in judicial decisionmaking on when to issue an *in absentia* order. To explore this issue, we examined the *in absentia* rates of individual judges who had at least one hundred nondetained initial case completions during the study period, what we call active judges.[231] Figure 7 displays the *in absentia* rates for active judges in the top twenty-five busiest court locations. Each individual judge is represented by a pipe ("|").[232] These markings visually depict variation among judges at the city level. For example, the seventeen active judges in Houston ordered *in absentia* removal at surprisingly different rates, from a low of 16% to a high of 92%. Similarly, in Baltimore, one active judge ordered *in absentia* removal in almost every single case, whereas three judges had *in absentia* rates below 30%.

230 Figure 5 analyzes the twenty-five jurisdictions from our Nondetained Removal Sample with the greatest number of initial case completions. In it, we compare the *in absentia* removal rate at the initial case completion with the overall representation rate in the jurisdiction.

231 Focusing on these active judges allows us to more reliably analyze commonalities and variations within jurisdictions. During our study period, these active judges accounted for 99% of all initial case completions (n = 1,015,606 of 1,027,694 initial case completions) in the busiest twenty-five jurisdictions.

232 In addition, the total number of active immigration judges in each jurisdiction is listed alongside the city on the y-axis of Figure 7.

Figure 7: *In Absentia* Removal Rate for Active Judges, by Court Location (2008–2018) (Nondetained Only)



Acknowledging judicial variation within cities underscores that judges in different jurisdictions do vary in their approaches to ordering *in absentia* removal. Even so, the overall pattern across these different court locations remains striking.[233] This finding suggests that local court practices and norms are relevant to shaping how judges within different jurisdictions rule when faced with a respondent who does not come to court.[234]

In summary, Part III builds on the methods introduced in Part II to analyze the relationship between *in absentia* removal and attorney representation, applications for relief, and court jurisdiction. We show that respondents who have attorneys almost always come to court, as do those who seek relief in court. Rates of *in absentia* removal also vary by judicial district, although individual judges within those districts also order *in absentia* removal at uneven rates. As

233 *See supra* Figure 5.

234 Research in the context of the federal criminal courts has similarly found that judges are influenced by the local court context within which they practice. *See, e.g.*, Brian Johnson et al., *The Social Context of Guidelines Circumvention: The Case of Federal District Courts*, 46 CRIMINOLOGY 737, 737-38, 767-73 (2008) (finding that organizational court context was associated with variations across federal district courts in the likelihood of judge-initiated downward departures in sentencing decisions); Jeffery T. Ulmer & Brian D. Johnson, *Organizational Conformity and Punishment: Federal Court Communities and Judge-Initiated Guidelines Departures*, 107 J. CRIM. L. & CRIMINOLOGY 253, 266-89 (2017) (finding variation in sentencing practices of federal judges at the local district court level was associated with local organizational culture and expectations).

we now discuss in the Conclusion, these findings have implications for how immigration courts adjudicate cases and other policy debates.

CONCLUSION

We began this Article with a simple question: Do immigrants come to their immigration court hearings? Contrary to the claims of current government officials that immigrants "never" come to court, our data-driven analysis reveals that 88% of all immigrants in immigration court with completed or pending removal cases over the past eleven years have attended all their court hearings.[235] Limiting our analysis to only nondetained cases, we still find a high compliance rate: 83% of all nondetained respondents in completed or pending removal cases attended all their hearings since 2008.[236] These and other measurements of *in absentia* removal presented in this Article contest recent claims by President Trump and other government officials that almost all immigrants abscond from court.

A key insight of our analysis is that the method chosen for measuring failures to appear matters. As we have set forth, the method adopted by the government to measure rates of *in absentia* removal—as a percentage of initial immigration judge decisions—ignores a large number of court cases in which respondents continue to appear in court. In particular, the government's measurement ignores cases that are administratively closed, an essential tool that has been used by immigration judges over the past decade to remove cases indefinitely from the immigration court's docket. The government's measurement also ignores the historically high number of backlogged cases pending in immigration courts today. These backlogs matter because nondetained deportation cases now take many court hearings and several years to resolve. This Article has argued that counting administrative completions and pending cases in the *in absentia* removal measurement is a necessary complement to the government's measurement that enhances public understanding of the rate at which noncitizens are complying with their court dates. We recommend that future statistical reporting by the EOIR include these measurements.

As this Article has shown, immigration court compliance rates must be considered against the backdrop of a pervasive failure of the Department of Homeland Security to include the time and date of hearings in the charging documents given to individuals in removal proceedings. The Supreme Court's decision in *Pereira v. Sessions* has put the spotlight on the challenges that respondents often face in finding out about their court dates. This reality

235 *See supra* Table 6 and accompanying text.

236 *See supra* Table 7 and accompanying text.

has made it hard for individuals—particularly if they do not speak English, are unfamiliar with the court system, and do not have lawyers—to figure out when and where to go to court. The fact that half of *in absentia* decisions over the past decade were issued at the first or second court hearing[237] reveals that immigration judges have been quick to penalize respondents for not appearing in court. In light of these issues, one simple reform that could be implemented is to train judges to use the first hearing to ensure that proper notice was provided before issuing any *in absentia* finding. The immigration courts could also learn from the proven success of other court systems in providing reminder calls or postcards with the accurate time and date of the hearing.

Our Article also contributes to the growing understanding of jurisdictional variation in immigration court decisionmaking. We find that rates of *in absentia* removal varied widely based on the geographic location of the immigration court. While factors such as the availability of immigration attorneys and local prosecutorial practices no doubt contribute to these patterns, our findings suggest that local court practices for handling failures to appear play a salient and underappreciated role in how cases are resolved. Greater training of immigration judges to ensure consistency in their application of the *in absentia* process—which requires the government to prove that written notice of the hearing was provided and that the respondent is subject to removal—is essential.

Unlike government reports that ignore the subsequent history of *in absentia* orders, this Article also explored whether *in absentia* orders withstood later review. Since 2008, 15% of those who were ordered removed *in absentia* have successfully reopened their cases and had their *in absentia* orders rescinded.[238] This crucial finding suggests that many individuals who are removed *in absentia* wanted to attend their court hearings but never received notice or faced hardship in getting to court.

We believe that giving immigration judges greater independence to give respondents a second chance to come to court would help address this issue and enhance court appearance rates. The immigration law gave judges this independence prior to 1990, and this earlier version of the law could provide a starting point for reform.[239] Indeed, before the 1990 change in the law when judges were given more discretion on how to handle failures to appear in court, they often exercised caution by not ordering deportation when they were concerned that respondents might not have received notice of the

237 *See supra* Figure 2 and accompanying text.

238 *See supra* Table 8 and accompanying text.

239 *See supra* note 10 and accompanying text.

hearing.[240] Our independent analysis of current EOIR data reveals that in those rare cases where immigration judges did give individuals a second chance to come to court, half did show up at the next hearing.[241]

Other essential reforms that our research supports include removing case quotas and aggressive case completion goals. Immigration judges are already under immense stress in their jobs.[242] Placing heightened pressure on immigration judges to complete their cases more quickly can improperly influence judges to issue *in absentia* orders in haste, even when notice is clearly inadequate.

More ambitiously, this study supports the growing momentum behind creating an independent structure for the immigration courts.[243] The federal tax and bankruptcy courts provide precedent for creating specialized federal courts under Article I of the United States Constitution.[244] Such an independent court structure would help to reduce the prevalence of *in absentia* orders by giving immigration judges more authority over their dockets and individual case decisions.[245]

---

240 *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-90-18, IMMIGRATION CONTROL: DEPORTING AND EXCLUDING ALIENS FROM THE UNITED STATES 30 (1989), http://archive.gao.gov/f0302/140072.pdf [https://perma.cc/U88N-C6SN] (noting that immigration judges in New York and Los Angeles interviewed prior to 1990 "said they are willing to hold deportation hearings in absentia only if they are convinced that the aliens received proper notification of the time and place of the hearing").

241 *See supra* note 136 and accompanying text.

242 Stuart L. Lustig et al., *Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges Stress and Burnout Survey*, 23 GEO. IMMIGR. L.J. 57, 60 (2008) (finding that the burnout level of federal immigration judges was higher than the levels reported by hospital physicians and prison wardens).

243 In 2018, Senators Mazie K. Hirono, Kirsten Gillibrand, and Kamala Harris introduced the Immigration Court Improvement Act, a bill that would insulate immigration judges from top-down political interference. Press Release, Sen. Mazie K. Hirono, Hirono, Gillibrand, Harris Introduce Bill to Insulate Immigration Judges from Political Interference 1 (Apr. 18, 2018), https://hirono.senate.gov/news/press-releases/hirono-gillibrand-harris-introduce-bill-to-insulate-immigration-judges-from-political-interference [https://perma.cc/CPR4-748M]. An early proposal for an independent immigration court was made prior to the establishment of the EOIR by Maurice Roberts, the former Chairman of the Board of Immigration Appeals. Maurice Roberts, *Proposed: A Specialized Statutory Immigration Court*, 18 SAN DIEGO L. REV. 1 (1980).

244 The Federal Bar Association (FBA) recently completed a report proposing model legislation to establish an Article I immigration court. *See Congress Should Establish an Article I Immigration Court*, FED. BAR ASS'N, https://www.fedbar.org/government-relations/policy-priorities/article-i-immigration-court [https://perma.cc/CQ5D-C2AU] (last visited Jan. 10, 2020). The FBA proposal is supported by the union representing immigration judges, the National Association of Immigration Judges. *See* Letter from Hon. A. Ashley Tabaddor, President, Nat'l Ass'n of Immigration Judges, to Elizabeth Stevens, President, Fed. Bar Ass'n, Immigration Law Section (Mar. 15, 2018), https://www.naij-usa.org/images/uploads/publications/NAIJ_endorses_FBA_Article_I_proposal_3-15-18.pdf [https://perma.cc/LC29-BVH3] (endorsing the Federal Bar Association's proposed legislation due to the "proven . . . conflicts of interest" that arise when immigration courts can be used as "political pawn[s] by various administrations on both sides of the aisle").

245 Although the creation of an Article I immigration court would solve many problems within the court system, as Amit Jain has warned, such a change must be accompanied by other procedural

The complex and nuanced picture of *in absentia* removal presented in this Article also has immediate relevance to the current debates in which statistics on failures to appear play a key role. For example, our finding that the vast majority of nondetained respondents attend their court hearings does not support initiatives for stricter detention rules and expanded detention capacity.[246] Rather, this study supports releasing more respondents from custody given the high likelihood that they will attend their future court hearings. Our analysis showing that asylum seekers almost always attend their court hearings similarly undermines arguments that asylum seekers should be prevented from entering the country out of a fear they will not come to court.[247] And our data showing that noncitizens with lawyers have near perfect attendance rates suggests that expanding funding for pro bono lawyers and know-your-rights programs could play an important part in improving the functioning of the immigration court system.[248]

Our overarching goal in this Article is to encourage policymakers and future researchers to think critically about how to measure *in absentia* removal. This topic has generated considerable debate and much confusion in the past. It has also led to the increasing incarceration of noncitizens. Our data-driven analysis uses the government's own court database to insert verifiable measurements into the discussion. Moreover, we present alternative methods of measurement that can be relied upon in future research to produce reliable and understandable measurements.

and substantive forms. Amit Jain, *Bureaucrats in Robes: Immigration "Judges" and the Trappings of "Courts,"* 33 GEO. IMMIGR. L.J. 261, 324 (2019).

246 *See supra* Table 7 and accompanying text.

247 *See supra* Figure 4 and accompanying text.

248 *See supra* Figure 3 and accompanying text.